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Supreme Court, U.S.
FILED

No. _____ 08-341 SEP 12 2008

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In The

Supreme Court of the United States

JOSEPH ENGEL, III, an Attorney at Law,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF MONTANA
by and through its COMMISSION ON PRACTICE
and OFFICE OF DISCIPLINARY COUNSEL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Montana

PETITION FOR WRIT OF CERTIORARI

DANE J. DURHAM
12989 Occidental Road
Sebastopol, CA 95472
Tel.: (707) 874-1860

Counsel of Record

QUESTION PRESENTED

Did the Montana Supreme Court's *ad hoc* changes to its Rules of Lawyer Disciplinary Enforcement deny Petitioner procedural due process of law by improvising an appeal process for the Office of Disciplinary Counsel contrary to those Rules, and without jurisdiction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner requests this Court to issue a writ of certiorari to review an order of the Montana Supreme Court ("MSC") which suspended him from the practice of law for sixty days, imposed public censure, and ordered him to pay costs of disciplinary proceedings. The MSC acted unconstitutionally for the reasons stated below.

PROCEEDINGS BELOW

The findings and conclusions of the Panel composed of six individuals, four lawyers and two lay persons from various Montana locations, unanimously determined that there was insufficient evidence that Petitioner had violated any rules of professional conduct and recommended dismissal of the complaint. App. 60-74.

An Order, three Opinions by the MSC and an intervening Panel decision followed the initial Panel decision. They are attached as Appendices as follows: the MSC Order of December 6, 2006 is App. 56; the MSC opinion rendered *In the Matter of Joseph C. Engel, III*, 2007 MT 172, 169 P.3d 345 (July 17, 2007, hereafter, *Engel I*) is App. 16; The Recommendation for Discipline by the Adjudicatory Panel October 25, 2007 is App. 52; *In the Matter of Joseph C. Engel, III*, 2008 MT 42, 177 P.3d 502 (February 6, 2008, hereafter, *Engel II*) is App. 35; and *In the Matter of Joseph C.*

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JURISDICTION

The final order of the MSC was filed on June 17, 2008. On July 22, 2008, MSC granted a stay to allow Petitioner to file this petition. This Petition is timely filed pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This Petition involves the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, § 2, cl. 2; the Fourteenth Amendment "due process" clause of the United States Constitution; The *Montana Rules of Lawyer Disciplinary Enforcement*, (2002), Rules 10E.(5) and 16. App. 75.

The Supremacy Clause of United States Constitution states in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Laws of the Land; and the Judges in every state shall be bound thereby any Thing in the Constitution or Laws of any State to the contrary notwithstanding. U.S. Const. Art. VI.

The Fourteenth Amendment of the United States Constitution states in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Petitioner is a 61 year-old attorney who was admitted to the Montana Bar upon his graduation from the University of Montana law school in 1974.

On November 20, 2006, a six-member Adjudicatory Panel of the Montana Commission on Practice ("Panel") recommended dismissal of a formal complaint filed by the Montana Office of Disciplinary Counsel ("ODC") against Petitioner. The Panel found no clear and convincing evidence of a violation of any rule of professional conduct. See App. 60.

This Petition presents the question whether the MSC denied Petitioner due process of law by violating its own rules of lawyer disciplinary enforcement. The MSC lacked jurisdiction to change its rules without formal promulgation, adoption, or amendment.

In 2002, the MSC established "a comprehensive lawyer discipline . . . system" and promulgated the

Montana Rules of Lawyer Disciplinary Enforcement ("RLDE 2002"). Preamble to RLDE 2002 at App. 75. Under Rule 10E.(5), the ODC was required to advocate for the findings and conclusions of the Panel. But, on December 6, 2006, the MSC ordered that the ODC **could** object to the Panel's decision. App. 56.

In other words, under the RLDE 2002, the ODC could **not** appeal the Panel's recommendation to dismiss the formal disciplinary complaint. The ODC was required to support the decision of the Panel. Instead of following its procedures, the MSC improvised a right of appeal for the ODC without formally amending its rules.

The MSC thereby denied Petitioner procedural due process.

STATEMENT OF THE CASE

On November 20, 2006, the Adjudicatory Panel of the Commission on Practice (COP) of the Montana Supreme Court recommended dismissal of formal charges filed by the ODC. The RLDE 2002 required the ODC to "advocate for" (not challenge) the recommendation of the Panel. Rule 10E.(5) of the RLDE 2002. App. 75. On December 6, 2006, the MSC acknowledged:

> "ODC has filed his notice that he will not be filing objections to the COP's findings of fact, conclusions of law and recommendation [of dismissal] because Rule 16 of the [RLDE]

> provides that while the respondent attorney may file objections to the COP's findings, conclusions, and recommendations, there is no reciprocal provision for Disciplinary Counsel to file objections.
>
> Indeed, Rule 16 is written from the premise that the COP is recommending some form of discipline against the respondent attorney. . . . Although our review of disciplinary cases is de novo we are not inclined to conduct our review of contested cases such as the one here, in a vacuum without argument of counsel. . . ." App. 56-57.

Ignoring the comprehensive RLDE it promulgated in 2002, the MSC improvised new procedures. The MSC invited the ODC to object to the Panel's findings and conclusions. App. 57. The Chief Justice of the MSC dissented:

> Our Rules do not provide for objections by the ODC, and I would not make this exception for this particular case. If we want to revise our Rules, we should do so. Otherwise, we should follow them as we expect everyone else to do. App. 59.

In response, the ODC filed four objections to the Panel's findings and conclusions. *Engel I*, App. 16, at ¶ 1-2. The MSC found that Petitioner violated three rules of professional conduct. *Id.* at ¶¶ 23-41. The MSC remanded the case to the Panel for a recommendation of appropriate discipline. *Id.* at ¶ 51.

On remand, a different Panel voted 4-3 to impose public censure, but no suspension. Three members voted for a private reprimand only. See App. 52.

Then, in *Engel II*, App. 35, **supra**, the MSC again rejected the Panel's recommendation. The MSC voted 4-3 to impose public censure and a sixty day suspension from practice upon Petitioner and also ordered Petitioner to pay the costs of disciplinary proceedings. The three-member dissent in *Engel II* stated:

> "Given that the Commission on Practice has twice considered this matter and has had the benefit of hearing the witnesses firsthand, I would defer to the Commission's recommendation that Mr. Engel be subject to public censure and be responsible for the costs of the disciplinary proceedings." App. 48.

In February 2008, Petitioner asked the MSC to withdraw *Engel I* and *Engel II* opinions and to dismiss the formal complaint because the MSC did not have jurisdiction to make *ad hoc* changes to its rules. The Court entered an Order calling for briefs. App. 49.

On June 17, 2008, the MSC entered an opinion (*Engel III*) in which it stated that it "still possess[es] subject matter jurisdiction over these disciplinary proceedings" and that "[n]othing in the process by which the Court came to review Engel's disciplinary proceeding deprived the Court of its constitutionally endowed authority to regulate the conduct of lawyers." *Id.* ¶ 26. The MSC did not address Petitioner's contentions that it violated its rules. App. 1-15.

On July 22, 2008, the MSC granted a stay to allow Petitioner to file this petition.

SUMMARY OF FACTS

Petitioner represented Alice P. Kloss. The relevant facts of Petitioner's representation are set forth in the Panel's findings and conclusions. App. 60-73.

In 2004, counsel representing stockbrokers sued by Petitioner filed an ethics complaint against Petitioner with ODC. At no time did Petitioner's client or her family complain about his services to her.

REASONS FOR GRANTING THE PETITION

I. THE MSC DENIED PROCEDURAL DUE PROCESS BY VIOLATING ITS RULES

A license to practice law is a property right that cannot be suspended without due process. *Friedman v. Committee of Bar Examiners*, 824 A.2d 866 (Conn. 2003), citing *In re Ruffalo*, 390 U.S. 544 (1968).

The MSC invited the ODC to file objections to the decision of the Panel in violation of the rule that required the ODC to advocate for the findings and conclusions of the Panel. RLDE (2002) 10E.(5). Rule 10E.(5) RLDE states: "Disciplinary Counsel shall: (5) Advocate findings of fact and conclusions of law resulting from Adjudicatory Panel proceedings." (Underlining added). App. 75.

The balance of the RLDE (2002) did not allow the ODC to seek review of a recommendation of dismissal by the Panel. Rule 16 states that the MSC may review a "recommendation for discipline" only, not a recommendation for dismissal. App. 79. The MSC acknowledged that "Rule 16 was written from one perspective only: that some form of discipline had been recommended by the Adjudicatory Panel." Order dated December 6, 2006, App. 56.

Rule 16 permits only "the lawyer" (not the ODC) to file "objections" to a Panel decision. Notwithstanding, the MSC amended Rule 16 by judicial fiat and invited the ODC to file objections. See *Engel III*, App. 11-12, ¶¶ 22-23 where the court acknowledges its actions.

Moreover, under the MSC's *ad hoc* procedures, Petitioner had no opportunity to object to the MSC's findings and conclusions in *Engel I* or *Engel II*. In other words, Petitioner lost rights under Rule 16 to review of findings and conclusions supporting a recommendation for discipline.

This is particularly significant because the MSC never reversed the Panel's original finding that there was no "clear and convincing evidence" of a violation of the Rules of Professional Conduct. ODC has the burden of proving each and every element of the alleged offenses by "clear and convincing evidence." *In the Matter of Joseph Marra*, 2004 MT 8, 319 Mont. 213, 87 P.3d 384. In other words, the MSC seeks to impose discipline upon Petitioner for three violations

of the Rules of Professional Conduct, without identifying any "clear and convincing evidence" in support of the decision. *Engel I*, App. 24-31.

The Ninth Circuit Court of Appeals has held that "courts must observe their own disciplinary rules when sanctioning lawyers for violations of ethical standards." *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198-99 (9th Cir. 1999); *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986).

Other Circuits have held that District Courts must scrupulously follow procedural rules adopted by them. Notice, an opportunity to be heard *and* adherence to procedural rules are minimum requirements of due process. *In re Fletcher*, 424 F.3d 783, 792 (8th Cir. 2005). Courts may amend their rules, but they may not change the rules in the middle of proceedings and apply them retroactively on an *ad hoc* basis. *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988); *In re Abrams*, 521 F.2d 1094, 1104 (3rd Cir. 1975) "[disciplinary authority] was obliged to follow its own rules."

> The . . . courts adopted the Model Rules. The practicing bar should therefore be allowed to proceed with confidence and the assurance courts will follow the rules they themselves did adopt and can freely amend. *Thalheim*, 853 F.2d at 390.

In dissent, the Chief Justice of the Montana Supreme Court agreed: "[this] Court should follow its own rules like it expects everyone else to do." Also

see the dissent in *In re Bird,* 353 F.3d 636 (8th Cir. 2003):

> It takes an exquisite talent for irony for the courts to punish a rule breaker with one hand while they break their own rules with the other. Such inconsistency should not be allowed to prevail in modern-day court/lawyer interface.

Weeks ago, the MSC acknowledged that amendment of the RLDE by judicial fiat would violate fundamental fairness required by procedural due process. *Billings Gazette v. The State of Montana, through its Commission on Practice and Office of Disciplinary Counsel,* 2008 MT 287 at ¶ 12, ___ Mont. ___, ___ P.3d ___ (decided August 12, 2008).

In sum, an attorney facing professional discipline must be able to rely upon written rules of disciplinary enforcement. A court may amend those rules, but it may not apply *ad hoc* rule changes to a lawyer who relies on a court's written rules.

II. THE MSC DENIED PROCEDURAL DUE PROCESS BECAUSE IT LACKED JURISDICTION TO CHANGE ITS RULES BY JUDICIAL FIAT

Article VII, ¶ 2 (3) of the *Montana Constitution* (1972) defines the MSC's rule-making jurisdiction:

> [the Supreme Court of Montana] may make rules governing appellate procedure, practice and procedure, for all other courts, admission to the bar, and conduct of its members. Rules

> of Procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

In its introduction to the *Montana Rules of Lawyer Disciplinary Enforcement* (2002), the MSC stated:

> " . . . In the exercise of that jurisdiction, the Court hereby adopts and promulgates the following Rules for Lawyer Disciplinary Enforcement . . . "

The MSC procedure to amended its rules occurs by publishing proposed rule changes in the Bar publication known as *The Montana Lawyer*, as well as on its website; issuing a declaration to the Montana Bar Board of Trustees requesting comments; advising of a comment period for members after which, based upon comments received and other considerations, the "promulgations" or "amendments" were "adopted."[1] See *In the Matter of the Formation of East Bench Irrigation District*, 2008 MT 210, ¶ 6, ___ Mont. ___, ___ P.3d ___, where the Court stated Article VII, § 2 (3) of the *Montana Constitution* (1972) "provides that the Supreme Court may make rules governing . . . admission to the bar and the conduct of its members. . . . Just as clearly the legislature is empowered to veto any such rules promulgated by this Court, [but] it is not empowered to replace those

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[1] *Montana Lawyer*, vol. 32, No. 7 (April 2007), p. 27 (advising that the Court would no longer give "the lawyer" 30 day notice prescribed by Rule 16 RLDE and it would become "self-executing.")

rules with new ones. . . . That task rests solely within the province of this Court."

Written rules which have been formally promulgated and adopted should be treated as legislation. They may not be changed on an *ad hoc* basis "by [judicial] fiat." See *In the Matter of the Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 347, 126 P.3d 1262, ¶ 39:

> As the author of the court rules we are in a position to reveal the actual meaning of what was sought to be conveyed . . . but in the interest of certainty and consistency we approach them as though they had been drafted by the legislature. . . . We may not expand the scope of a rule by fiat.

In this case, the MSC did not have jurisdiction to change its written rules by judicial fiat. Accordingly, the MSC denied Petitioner procedural due process by applying its *ad hoc* rule changes to him.

CONCLUSION

For the reasons stated above, this petition should be granted.

Respectfully submitted,

DANE J. DURHAM
12989 Occidental Road
Sebastopol, CA 95472
Tel.: (707) 874-1860

Counsel of Record

No. 05-174

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2008 MT 215

IN THE MATTER OF JOSEPH ENGEL, III, An Attorney at Law. Respondent.	)))))	OPINION AND ORDER

(Filed Jun. 17, 2008)

¶1 Respondent Joseph Engel, III (Engel) filed an objection to the Orders and Opinions rendered in *In re Engel,* 2007 MT 172, 338 Mont. 179, 169 P.3d 345 [hereinafter *Engel I*], and *In re Engel,* 2008 MT 42, 341 Mont. 360, 177 P.3d 502 [hereinafter *Engel II*]. Our Order of March 13, 2008, directed Engel and the Office of Disciplinary Counsel (ODC) to file briefs addressing the Court's subject matter jurisdiction to impose a discipline upon Engel. Engel and ODC filed their briefs and we now deny Engel's petition.

¶2 We determined in *Engel I* that Engel had violated Rules 1.5, 1.15, and 1.18, of the Montana Rules of Professional Conduct (MRPC). *Engel I,* ¶ 48. In *Engel II,* we declined to follow the recommendation of the Commission on Practice of the Supreme Court of the State of Montana (the Commission) that Engel's discipline be limited to a public censure and the cost of the disciplinary proceedings. *Engel II,* ¶ 2. We instead determined that Engel's conduct also

warranted a sixty-day suspension from practice. *Engel II,* ¶ 38. We directed Engel to appear before the Court on March 18, 2008, for administration of the public censure and further directed that Engel's sixty-day suspension would commence as of the date of the public censure. *Engel II,* ¶¶ 36, 38.

¶3 Engel filed a motion for leave to file a petition for withdrawal of opinions in *Engel I* and *Engel II,* dismissal, and a request for oral argument. Engel alleged that the process by which the Court has reviewed his disciplinary proceeding has deprived the Court of subject matter jurisdiction over the formal complaint filed by ODC against Engel. Engel also raises procedural due process issues. ODC filed a brief in opposition to Engel's motion. We vacated Engel's scheduled public censure and directed the parties to file briefs addressing the issue of the Court's subject matter jurisdiction.

STANDARD OF REVIEW

¶4 Whether a court possesses subject matter jurisdiction presents a question of law. We review a fact finder's conclusions of law to determine whether they are correct. *Boe v. Court Adm'r for the Mon. Jud. Branch,* 2007 MT 7, ¶ 5, 335 Mont. 228, ¶ 5, 150 P.3d 927, ¶ 5. Whether a party has been denied a due process right presents a constitutional law question. We exercise plenary review of constitutional law questions. *State v. Racz,* 2007 MT 244, ¶ 13, 339 Mont. 218, ¶ 13, 168 P.3d 685, ¶ 13.

DISCUSSION

¶5 The Court finds it difficult to square Engel's subject matter jurisdiction argument with the nature of the Court's role in the attorney discipline system. As we have noted on several occasions, this Court "'possesses original and exclusive jurisdiction and responsibility'" in all matters involving the disciplining of lawyers in the state of Montana. *See In re Potts,* 2007 MT 81, ¶ 31, 336 Mont. 517, ¶ 31, 158 P.3d 418, ¶ 31 (quoting Introduction, Montana Rules for Lawyer Disciplinary Enforcement (MRLDE)); *Engel I,* ¶ 18 (same); *In re Potts,* 2007 MT 236, ¶ 14, 339 Mont. 186, ¶ 14, 171 P.3d 286, ¶ 14 (same); and *Engel II,* ¶ 3 (same).

¶6 This authority derives from the 1972 Montana Constitution. Article VII, Section 2(3) provides that the Court may make rules governing "admission to the bar and the conduct of its members." Moreover, the regulation of lawyers in Montana "is a matter peculiarly within the inherent powers of this Court, subject, of course, to constitutional guaranties. . . ." *Goetz v. Harrison,* 153 Mont. 403, 404, 457 P.2d 911, 912 (1969). Rule 7, MRLDE, further provides that any lawyer admitted to practice in the State of Montana "is subject to the disciplinary jurisdiction of the Supreme Court of the State of Montana." Engel challenges only the process by which the Court came to review the complaint against him.

¶7 A brief review of that process is in order. Rule 11(5), MRLDE, empowers the Commission to request

that ODC prepare and file a formal complaint. *See also* Rule 3(B)(5), MRLDE. At the request of a review panel of the Commission, ODC filed a formal complaint against Engel on March 25, 2005. Once ODC initiated the formal disciplinary proceeding, the Commission's authority ended to resolve the complaint against Engel without a review by the Court. For example, Rule 13, MRLDE, allows the Commission, in its discretion, to give a lawyer a private admonition "in the name of the Supreme Court. . . ." Rule 13, MRLDE, limits the Commission's discretion, however, to "any time before initiation of formal disciplinary proceedings. . . ." ODC filed a formal complaint at the Commission's request and thereby triggered the Court's review of any disposition of the complaint against Engel.

¶8 The complaint proceeded through a hearing. An adjudicatory panel of the Commission issued findings of fact, conclusions of law, and a recommendation on November 16, 2006. The Commission recommended that the complaint against Engel be dismissed. Rule 12(C)(3), MRLDE, authorizes the Commission to recommend "for discipline or other disposition . . . " of formal complaints. *See also* Rule 4(B)(2), MRLDE. The Commission opted for the "other disposition" in the form of recommending that the complaint be dismissed. Engel makes no complaint of the process afforded to him through that point. Engel challenges what happened next.

¶9 Engel contends that the disciplinary process should have ended upon the Commission recommending that the complaint be dismissed. He points to the fact that Rule 16, MRLDE, contemplates that the Court's review of the Commission's proceeding will be limited to a recommendation of discipline. The Commission recommended no discipline here, and, therefore, Engel contends that the Court has no power to review the Commission's proposed disposition. Engel correctly notes that Rule 16, MRLDE, first discusses serving the lawyer with a copy of the Commission's "recommendation of discipline. . . ." This service provides the lawyer with the chance to file any objections to the Commission's recommendation. Rule 16, MRLDE. Rule 16 makes no provision for ODC filing an objection to the Commission's recommendation.

¶10 Rule 16 provides, however, that the Court "shall determine the appropriate discipline, if any, authorized by these rules" upon expiration of the time for the lawyer filing an objection to the Commission's recommendation. Rule 16 further provides that the Court "shall consider the matter, issue its written decision, and impose such discipline if any, *as it considers appropriate.*" (Emphasis added). Thus, Rule 16 imposes two limitations on the Court's power to impose discipline: (1) discipline authorized by the rules; and (2) discipline that the Court considers appropriate. The Court determined that a public censure, sixty-day suspension, and imposition of the costs of the proceedings against Engel would constitute the appropriate discipline. Rule 9, MRLDE,

specifically authorizes suspension, public censure, and imposition of the costs of the proceedings as appropriate forms of discipline.

¶11 The directive in Rule 12(C)(3) that the Commission shall make "a recommendation to the Supreme Court for discipline or other disposition of the case" further undermines Engel's claim that the Commission's dismissal recommendation should have ended the case. The Commission elected to recommend for "other disposition" in the form of the dismissal of the complaint against Engel. The Commission's authority stops upon making a recommendation of a proposed disposition. The Court retains the ultimate authority to determine the appropriate discipline. Rule 16, MRLDE.

¶12 Engel relies largely on cases where a court reversed disciplinary charges where some sort of procedural due process violation had infected the proceedings. In *Disciplinary Counsel v. Simecek,* 699 N.E.2d 933, 934 (Ohio 1998), the Ohio Supreme Court upheld three misconduct charges against a lawyer, but dismissed three others. The dismissed charges stemmed from the determination of a disciplinary panel that the lawyer's conduct violated not only the three charges originally contained in the complaint, but that the lawyer's conduct also violated three additional provisions of the disciplinary rules not contained in the complaint. The court refused to condone what it deemed to be a serious violation of the lawyer's right to procedural due process. *Simecek,* 699 N.E.2d at 934-35.

¶13 The court in *Simecek* analogized the procedural due process violation to the one addressed in *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222 (1968). Engel also relies upon *Ruffalo.* The lawyer disciplinary board in *Ruffalo* added a misconduct charge after it had heard the testimony against a lawyer. The Court stated that a lawyer in a disciplinary proceeding is "entitled to procedural due process, which includes fair notice of the charge." *Ruffalo,* 390 U.S. at 550, 88 S. Ct. at 1226. The charge must be known before the proceedings begin to avoid laying a trap for the accused. The Court held that the absence of fair notice "as to the reach of the grievance procedure and the precise nature of the charges . . . " had deprived the lawyer of procedural due process. *Ruffalo,* 390 U.S. at 552, 88 S. Ct. at 1226.

¶14 The proceedings against Engel suffer from no similar infirmity. ODC filed the formal complaint against Engel. ODC's original complaint alleged that Engel had committed four counts of professional misconduct. *Engel I,* ¶ 15. At no time did ODC or the Commission add new charges of misconduct. Engel takes issue, however, with the fact that the Commission determined that no clear and convincing evidence supported the allegations in ODC's complaint. The Commission initially had recommended that this Court dismiss the complaint. *Engel I,* ¶ 17. Engel contends that the proceedings should have ended upon the Commission's initial recommendation.

¶15 Engel points to the fact that Rule 14, MRLDE, provides that a complainant unsatisfied with the

Commission's disposition of a complaint may petition for reconsideration within thirty days of receipt of notice of the Commission's disposition of the complaint. He argues that ODC failed to file a petition for reconsideration within thirty days of the Commission's recommendation that the complaint against Engel be dismissed. ODC's failure, he argues, ended the matter. We rejected this claim in *Engel I.* We noted the problems with the language of Rule 14, MRLDE, but concluded that Rule 14's reconsideration requirements applied only to informal complaints filed by a private party rather than a formal complaint pursued by ODC. *Engel I,* ¶¶ 20-21.

¶16 Engel also points to other cases in which the court rejected the recommendation of a lawyer disciplinary board when the board sought to apply a rule retroactively to the past conduct of a lawyer. The lawyer disciplinary board in *In re Disciplinary Proceeding Against Haley,* 126 P.3d 1262 (Wash. 2006), recommended that a lawyer, proceeding pro se, had violated a rule that limited contact between a lawyer representing a party and an opposing party. The lawyer had written a letter directly to the opposing party and had left a message on the telephone answering machine at the opposing party's home. *Haley,* 126 P.3d at 1264. The Washington supreme court dismissed this count even though it agreed with the board's interpretation of the no contact rule. The court determined that the "absence of a prior decision from this court, along with presence of conflicting or equivocal authority from other jurisdictions and legal

commentaries . . . " rendered the rule impermissibly vague and, thus, subject only to prospective application. *Haley,* 126 P.3d at 1269.

¶17 The rule at issue in *Haley* went to the permissibility of the lawyer's underlying conduct. We face no similar ambiguity in the clarity of the rules that Engel violated regarding the reasonableness of his fee or his failure to put a client's retainer fee into a trust account. Nothing changed with respect to the application of Rule 1.5, MRPC, regarding the reasonableness of Engel's fee, or to the application of Rules 1.15 and 1.18, MRPC, regarding Engel's failure to deposit a client's retainer fee into a trust account. Likewise, nothing in these rules or their application raises constitutional concerns similar to those presented in *Matter of Keller,* 213 Mont. 196, 693 P.2d 1211 (1984). There the Court held that First Amendment concerns trumped ethical rules relating to statements by lawyers regarding pending cases. *Keller,* 213 Mont. at 202, 693 P.2d at 1214. No competing constitutional provision protects Engel's right to charge an unreasonable fee or undermines Engel's duty to deposit client retainer fees into a trust account.

¶18 Finally, Engel contends that the Court adopted the MRLDE and that the Court should be bound strictly by them. The court in *Matter of Thalheim,* 853 F.2d 383 (5th Cir. 1988), dismissed a suspension against a lawyer based upon the district court's failure to follow its own procedural rules in a disciplinary proceeding. *Thalheim,* 853 F.2d at 390. The federal judicial district in question had adopted

procedural rules that called for a district judge to appoint a panel of three lawyers from its standing committee to investigate allegations of misconduct by a lawyer. *Thalheim,* 853 F.2d at 387.

¶19 The three-lawyer panel recommended that the evidence of misconduct did not warrant formal disciplinary proceedings. The district court nevertheless appointed a special counsel to prosecute the alleged misconduct and proceeded to hold a two-and-a-half hour hearing. The presiding district court judge issued a memorandum after the hearing in which he stated that he had found the allegations of misconduct to be true. *Thalheim,* 853 F.2d at 386. The district court's memorandum further recommended that the lawyer be suspended for a year on the basis of his misconduct. A majority of the district judges in the federal judicial district agreed with the memorandum's finding of misconduct and increased the suspension to two years. *Thalheim,* 853 F.2d at 386.

¶20 The Fifth Circuit reversed. The court announced that federal district courts are bound by their own disciplinary rules when proceeding against lawyers for violations of ethical standards. *Thalheim,* 853 F.2d at 390. The court ruled that the district court had usurped its authority when it disregarded the discretion of the three-lawyer panel as to whether to initiate disciplinary proceedings against the lawyer. The court concluded that the rules did not authorize the district court to appoint a special counsel to prosecute disciplinary cases "if the investigative attorney panel has *not* recommended institution of

formal disciplinary proceedings. . . ." *Thalheim,* 853 F.2d at 388 (emphasis in original); *see also In re Bird,* 353 F.3d 636 (8th Cir. 2003) (district court's deviation from its procedural rules in a lawyer disciplinary proceeding constituted harmless error).

¶21 Engel's challenge presents no similar usurpation of the prosecutorial function by the court. A review panel of the Commission, which performs a role similar to the three-lawyer panel in *Thalheim,* requested ODC to initiate a formal complaint against Engel. ODC filed the formal complaint and proceeded to prosecute the claim against Engel before an adjudicatory panel of the Commission. The adjudicatory panel serves as a fact finder and issues conclusions of law in a manner similar to a trial court. This Court reviews the adjudicatory panel's findings of fact, conclusions of law, and recommended disposition of the case. Rule 16, MRLDE.

¶22 This Court deviated from the MRLDE only to the extent that it directed ODC to file a brief setting forth its view on the adjudicatory panel's recommendation that the complaint against Engel should be dismissed. The MRLDE nowhere contemplates ODC filing an objection to the adjudicatory panel's recommendation. In fact, Rule 16, MRLDE, directs the lawyer subject to the discipline to file an objection to the adjudicatory panel's recommendation. The rule further provides that ODC may file a response to the lawyer's objections. Rule 16, MRLDE.

¶23 We reversed the process here. We directed ODC to file objections to the adjudicatory panel's recommendation. We also provided Engel with the chance to respond to ODC's objections. No absolute standard exists for what constitutes due process. *McDermott v. McDonald,* 2001 MT 89, ¶ 10, 305 Mont. 166, ¶ 10, 24 P.3d 200, ¶ 10. The process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision. *Sage v. Gamble,* 279 Mont. 459, 465, 929 P.2d 822, 825 (1996). We have stated previously in the context of a lawyer disciplinary proceeding that due process requires notice and an opportunity to be heard. *Goldstein v. Commission on Practice,* 2000 MT 8, ¶ 40, 297 Mont. 493, ¶ 40, 995 P.2d 923, ¶ 40.

¶24 Our order of December 6, 2006, provided notice to Engel that ODC would be granted the opportunity to present its objections to the adjudicatory panel's recommendation. Our same order provided Engel with an opportunity to be heard. Engel took advantage of that opportunity to be heard. Engel first filed a motion to reconsider on December 14, 2006. We denied Engel's motion in an order dated December 28, 2006. Engel then filed his response to ODC's objections to the adjudicatory panel's recommendation on February 20, 2007. We rejected the adjudicatory panel's recommendation of dismissal in *Engel I* and remanded the matter to the Commission "for its consideration and recommendation of an appropriate sanction. . . ." *Engel I,* ¶ 51.

¶25 Engel participated in the proceedings on remand to the Commission. He appeared with counsel and testified personally. We rejected the Commission's recommendation of a private admonition in *Engel II.* We directed Engel to appear before the Court for a public censure, that Engel be suspended for sixty days, and that Engel bear the costs of the disciplinary proceedings. *Engel II,* ¶¶ 36-38. This decision prompted Engel to file his current petition. We granted Engel leave to file briefs addressing the question of whether the Court still possessed subject matter jurisdiction over the disciplinary proceeding against Engel.

¶26 We still possess subject matter jurisdiction over these disciplinary proceedings. Nothing in the process by which the Court came to review Engel's disciplinary proceeding deprived the Court of its constitutionally endowed authority to regulate the conduct of lawyers. Mont. Const. art. VII, § 2(3). We also now determine that Engel enjoyed the full panoply of rights afforded to lawyers facing disciplinary proceedings, including notice of the charges against him and an opportunity to be heard to contest those charges. *Goldstein,* ¶ 40. Engel took full advantage of his opportunity and we determine that the Court's order directing ODC to file its objections to the adjudicatory panel's recommendation of dismissal did not violate any of Engel's procedural due process rights.

CONCLUSION

¶27 Accordingly, it is hereby ordered that:

¶28 1. Joseph Engel, III, appear before the Supreme Court of the State of Montana on September 16, 2008, at 1:15 p.m. for the administration of a public censure;

¶29 2. Joseph Engel, III, pay, or make arrangements to pay, the costs of the proceedings before the Commission. Pursuant to Rule 9(A)(8), MRLDE, Disciplinary Counsel is directed to assemble and serve upon Joseph Engel, III, an itemized list of the costs and expenses incurred in this matter. Joseph Engel, III, shall then have ten days thereafter to file written objections and, if he desires, to request a hearing before an Adjudicatory Panel;

¶30 3. Joseph Engel, III, shall be suspended as attorney and counselor for a period of sixty days, commencing as of the date of the public censure, at the expiration of which time, upon payment of all costs incurred in this proceeding, he may resume the practice of law without further order. Joseph Engel, III, shall file an affidavit as required under Rule 29(A), MRLDE, in which he confirms that he has complied fully with the requirements of this order before resuming the practice of law. Joseph Engel, III, further shall comply fully with the requirements of Rule 30, MRLDE, and Rule 32, MRLDE.

¶31 4. The Clerk of this Court is directed to mail copies of this Order to Joseph Engel, III, by certified

mail, return receipt requested, and by ordinary mail to Joseph Engel's attorney, the Chairman and the Secretary of the Commission on Practice, the Office of Disciplinary Counsel, and the Executive Director of the State Bar of Montana.

DATED this 17th day of June 2008.

/s/ Brian Morris
Justice

We Concur:

/s/ Karla M. Gray
Chief Justice

/s/ W. William Leaphart

/s/ John Warner

/s/ James C. Nelson

/s/ Patricia Cotter

/s/ Jim Rice
Justices

No. 05-174

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2007 MT 172

IN THE MATTER OF JOSEPH ENGEL, III, An Attorney at Law. Respondent.	OPINION AND ORDER

¶1 The Commission on Practice of the Supreme Court of the State of Montana (the Commission) entered its findings of fact, conclusions of law, and recommendation to the Court on November 20, 2006, regarding a complaint filed against Joseph Engel, III, (Engel), an attorney licensed to practice law in the State of Montana. The Office of Disciplinary Counsel of the State of Montana (ODC) alleged in its complaint that Engel had violated numerous provisions of the Montana Rules of Professional Conduct (MRPC). The Commission concluded that no clear and convincing evidence supported the allegations made in the complaint. The Commission recommends that this Court dismiss the complaint. ODC objects to the Commission's recommendation. We conclude that Engel violated Rules 1.5, 1.15, and 1.18, MRPC. We remand this matter to the Commission for its consideration and recommendation of an appropriate sanction.

¶2 ODC presents the following issues for review:

¶3 1. Whether Engel violated Rule 1.5, MRPC, by charging an excessive fee for his legal services in a trust termination action.

¶4 2. Whether Engel violated Rules 1.15 and 1.18, MRPC, by failing to deposit retainer fees in an IOLTA or client trust account.

¶5 3. Whether Engel violated Rule 1.7, MRPC, by engaging in a conflict of interest.

¶6 4. Whether Engel violated Rules 1.14, 2.1, 8.4(c), MRPC, by failing to advise his client that a relative had mismanaged her affairs.

FACTUAL AND PROCEDURAL BACKGROUND

¶7 We discussed most of the facts giving rise to this matter in *In re Conservatorship of Kloss,* 2005 MT 39, 326 Mont. 117, 109 P.3d 205. We will repeat here only those facts necessary for our analysis. Alice Kloss (Kloss) was born on November 26, 1906. She died April 22, 2006, at the age of 99. Kloss, a widow, had no relatives living in Montana until 1998, when she fell and broke her legs, hip, and pelvis. The injuries forced her to move from her apartment to an assisted living facility in Great Falls. Kloss established the Alice P. Kloss Charitable Remainder Trust (CRT) on May 19, 1998. The CRT consisted of $365,000 from Kloss's roughly $1,000,000 estate.

¶8 After her injuries, Kloss requested that Kenneth Parrent (Parrent), her 71-year-old nephew, move from Colorado to Great Falls to assist in the care of her affairs. Kloss executed an unlimited power of attorney for Parrent to manage her assets. Engel represented Kloss in three legal matters: an action to terminate the CRT; a tort claim against Edward D. Jones; and a conservatorship proceeding involving Kloss. Kloss paid Engel approximately $296,000 for his services in these three separate matters.

¶9 Engel originally signed a fee agreement with Kloss on July 1, 1998, to terminate the CRT for an hourly rate of $125. Parrent signed the fee agreement on Kloss's behalf. Engel filed a petition to terminate the CRT on September 21, 1998. All of the CRT's beneficiaries voluntarily relinquished their interests. The District Court terminated the CRT on October 14, 1998. Engel's bills indicate that he performed 65.9 hours of work in terminating the CRT. Kloss paid Engel $8,362.50 for this work in 1998 according to the terms of the hourly agreement signed by Engel and Parrent.

¶10 Engel signed a second fee agreement with Kloss on October 27, 1998. This second fee agreement related to Kloss's action against her former brokerage firm, Edward D. Jones, and its manager. Kloss alleged that Edward D. Jones tortiously had caused her to execute the CRT. Parrent retained Engel to prosecute the action and to represent both Kloss's and Parrent's interests. The parties eventually settled the

action with Edward D. Jones agreeing to pay $150,000 to Kloss.

¶11 Kloss paid Engel a retainer of $20,000 pursuant to the October 27, 1998, agreement. The second fee agreement provided that Engel would bill Kloss at an hourly rate of $125 from the $20,000 retainer. The second fee agreement further provided that Kloss and Engel would divide any recovery in the action against Edward D. Jones, with Engel receiving thirty-five percent and Kloss receiving sixty-five percent. Engel received an additional $50,000 retainer in January 2002. Engel's accounting principles make it impossible to determine precisely to which litigation this $50,000 retainer fee applied. Engel contends that he used this $50,000 retainer fee to cover the cost of his work in a separate conservatorship action involving Kloss. It should be noted, however, that this conservatorship proceeding began in June 2003, about 18 months after Engel received the $50,000 retainer fee. Engel did not place either of these retainers into an IOLTA account or a client trust account. Engel instead placed the $20,000 and $50,000 retainers directly into his operating account.

¶12 Engel next modified the original July 1, 1998, fee agreement with Kloss relating to the termination of the CRT. Engel informed Kloss of the purported novation of the agreement through a letter that he sent to Kloss on February 1, 2000, in which he transmogrified the hourly fee arrangement for work already completed into a contingent fee. Engel informed Kloss that the contingent fee for representing

her in the CRT termination almost two years earlier would be one-third of the amount that he had "recovered" through his prosecution of the uncontested termination proceeding. Kloss signed the consent form on the bottom of the letter on February 22, 2000.

¶13 Engel further refined the fee agreement relating to the CRT termination through a letter to Parrent on July 5, 2000. Engel acknowledged receipt of $10,000 and confirmed that he would receive $10,000 monthly installments for the remainder of the year 2000, for a total of $70,000. Engel further informed Parrent that the remaining $50,000 due under the CRT termination fee agreement would be payable in 2001 with the specific timing being a "matter of mutual convenience."

¶14 Engel revised the 1998 CRT agreement a final time on October 3, 2003, through a "supplemental attorney-client fee contract." Engel intended this supplemental agreement to "replace[ ] entirely" the original hourly fee agreement and to be "retroactively effective" from July 1, 1998. The supplemental agreement provided that Engel would receive one-third of $365,000, the same amount as the value of the CRT.

¶15 ODC investigated a complaint regarding Engel's representation of Kloss. ODC alleged in a formal complaint that Engel had committed four counts of professional misconduct. The first count alleges that Engel had charged an unreasonable fee for his representation of Kloss in the CRT termination

action in violation of Rule 1.5, MRPC. The second count charges that Engel violated Rules 1.15 and 1.18, MRPC, by failing to deposit the $20,000 and $50,000 retainer fees in a trust account. Count Three alleges that Engel's representation of Kloss and Parrent constituted a conflict of interest in violation of Rule 1.7, MRPC. The fourth count accuses Engel of violating the duty of loyalty by failing to protect Kloss from Parrent's alleged misuse of her assets.

¶16 The Commission heard the matter on September 22, 2006. The hearing focused on the fee arrangements that Engel had entered with Kloss between 1998 to 2003. Engel testified that he viewed Kloss as "competent" and working "in concert" with Parrent. Engel further testified that he modified the July 1, 1998, fee agreement two years after the CRT had been terminated because he wanted to find a way to pay for Kloss's tort action against Edward D. Jones without exhausting Kloss's resources. Engel admitted that the CRT termination and the Edward D. Jones tort litigation constituted two separate matters, but Engel testified that he treated the CRT recovery as part of the "entire matter." Engel also agreed with the Commission that he created cumbersome, confusing, ambiguous documents that needed explanation.

¶17 The Commission determined that no clear and convincing evidence supported the allegation in the complaint against Engel. The Commission recommends that this Court dismiss the complaint. ODC objects.

STANDARD OF REVIEW

¶18 This Court "possesses original and exclusive jurisdiction and responsibility" in all matters involving the disciplining of lawyers in the State of Montana. *See* Introduction, Montana Rules for Lawyer Disciplinary Enforcement. As a result, we review *de novo* the Commission's findings of fact, conclusions of law, and recommendations. We weigh the evidence upon which the Commission's findings rest. *In the Matter of Potts,* 2007 MT 81, ¶ 32, 336 Mont. 517, ¶ 32, 158 P.3d 418, ¶ 32.

DISCUSSION

¶19 We first must address Engel's motion to dismiss ODC's objections to the Commission's recommendation. Engel argues that the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE) do not allow this Court's review of ODC's objection unless ODC first sought reconsideration of the Commission's decision under Rule 14, MRLDE. Engel asserts that Rule 14, MRLDE, requires the ODC to petition for reconsideration within thirty days of the panel's decision. Rule 14, MRLDE, provides that "[t]he Supreme Court may, in its sole discretion, review the Panel's disposition upon reconsideration." Engel contends that ODC's failure to request reconsideration of the panel leaves this Court with nothing to review.

¶20 Rule 14's limitation of this Court's review to matters that had been reconsidered by the

Commission does not apply to formal complaints submitted by ODC. Rule 14 sets forth the procedures to be taken by the "Adjudicatory Panel" when a "complainant" requests reconsideration of a disposition of a complaint. Rule 14's history reveals, however, that ODC does not qualify as a "complainant." Rule 14 originated out of former Rule 8B. Rule 8B existed before this Court made global changes to the lawyer disciplinary system that became effective in July 2002. Former Rule 8B and Rule 14 are nearly identical with the exception that Rule 14 substitutes the term "Panel" for "Commission."

¶21 The need for the change from "Commission" to "Panel" arose from the fact that Rule 8B operated when the Commission performed both prosecutorial and adjudicatory functions in the disciplinary system. Former Rule 8B applied only to complainants submitting informal complaints. The Commission would not give notice to itself under Rule 8B that it could request review of its own determination. This Court adopted the language of former Rule 8B almost verbatim in creating the new Rule 14. Rule 14 likewise applies to the informal complaints rather than the formal complaints lodged by ODC.

¶22 Moreover, Rule 14, MRLDE, applies to matters pending before an "Adjudicatory Panel." The Commission's filing of its findings, conclusions, and recommendations with this Court on November 20, 2006, precludes the panel from reconsidering its decision as the matter is no longer "pending" before the panel. Rule 14, MRLDE. We deny Engel's motion

to dismiss ODC's objections to the recommendations of the Commission.

¶23 *Whether Engel violated Rule 1.5, MRPC, by charging an excessive fee for his legal services in a trust termination action.*

¶24 ODC challenges the Commission's finding that Engel's fees of approximately $296,000 were not excessive when "taken as a whole." ODC argues that Engel's fees must be examined as two separate matters as evidenced by the two separate fee agreements entered by the parties. ODC points out that the July 1, 1998, fee agreement related to the termination of the CRT, while the October 27, 1998, fee agreement addressed Engel's representation of Kloss in the separate tort action against Edward D. Jones. ODC argues that Engel's fee of $121,545 under the July 1, 1998, fee agreement constituted an unreasonable fee in light of the work Engel had performed to terminate the CRT.

¶25 A lawyer's fees must be reasonable. Rule 1.5(a), MRPC. We consider the following factors in determining the reasonableness of a lawyer's fee: 1) the labor and time required, the novelty and difficulty of the question involved, and the requisite skill to perform the legal services properly; 2) the likelihood that the acceptance of the particular employment would bar the lawyer from accepting other employment; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the

client or by the circumstances; 6) the nature and the length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer performing the services; 8) whether the fee is fixed or contingent. Rule 1.5(a), MRPC.

¶26 Engel testified that he possesses no particular expertise in the area of trusts. The CRT termination was a simple process as evidenced by the fact that the matter had been uncontested. All of the CRT's beneficiaries voluntarily relinquished their interests. The district court terminated the CRT within one month of Engel filing the petition.

¶27 Helena lawyer Dan McLean (McLean) testified as an expert witness for ODC. McLean's practice focuses on estate planning and probate trust administration. McLean testified that the termination of Kloss's CRT was "a pretty simple process" that "would not have taken a great deal of time and effort." McLean further testified that the customary fee in Great Falls in 1998 for terminating a CRT ranged between $1,500 and $2,500.

¶28 Kloss initially paid Engel $8,362.50, according to the terms of the hourly agreement signed by Engel and Parrent. This amount far exceeds the going rate of $1,500 to $2,500 for this type of work in Great Falls in 1998. Engel's bills indicate that he performed 65.9 hours of work in terminating the CRT. Engel then modified his fees two years after the CRT had been terminated and after he had been paid for such work. Engel changed his fee from his hourly rate of

$125 to a contingency fee, wherein Engel would collect one-third of the $365,000 that Kloss had recovered in the CRT termination action. Engel collected $121,545 for his work in terminating the CRT.

¶29 ODC aptly describes Engel's justification for revising the CRT termination fee agreement as "hard to pin down." These justifications range from having exhausted his $20,000 retainer in the separate Edward D. Jones tort case to some sort of illusory tax advantage for Kloss. The Commission nevertheless determined that Engel's fees were not excessive when "[t]aken as a whole." Taking Engel's fees "as a whole" requires the Commission to merge the work that Engel performed in terminating the CRT with the work that Engel performed in the following years in the separate Edward D. Jones tort case. The parties signed separate fee agreements for each case. The two separate fee agreements specified the work to be performed by Engel and specified the fee that Engel would receive for his services in each matter.

¶30 We cannot agree with the Commission's conclusion that Engel's fees were not excessive, even when "taken as a whole." Engel received $121,545 for an uncontested trust termination proceeding. He also received approximately $175,000 from Kloss for his work in the Edward D. Jones tort litigation and his brief representation of Kloss in a conservatorship proceeding. The tort case settled with Edward D. Jones agreeing to pay $150,000 to Kloss. Engel's lack of transparency in his accounting practices makes it

nearly impossible to determine whether Engel's fee swallowed Kloss's entire recovery. We need not analyze the reasonableness of Engle's fee in the Edward D. Jones tort litigation, however, as that matter presently is not before us.

¶31 Engel further justifies the size of the fee for his work in pursuing the uncontested dissolution of the CRT based on the alleged aggressive litigation tactics employed by counsel for Edward D. Jones in the separate tort litigation, including a petition for appointment of a conservator for Kloss filed by counsel for Edward D. Jones. *Kloss,* ¶ 14. During the discovery process, Robert James (James), counsel for Edward D. Jones, learned that Kloss's estate had been depleted of more than $800,000 under Parrent's management, with over $400,000 being paid to Parrent and Engel for their services. *Kloss,* ¶ 5. James sought appointment of an outside conservator for Kloss. James filed the petition separately and in a different court from the Edward D. Jones tort litigation.

¶32 Engel fails to inform, however, that he first changed the fee agreement for terminating the CRT on February 1, 2000. James did not file a petition for appointment of a conservator for Kloss until June 12, 2003. Moreover, Engel never sought to change the fee agreement for the Edward D. Jones tort litigation. In fact, Engel sent Parrent a bill, dated March 7, 2000, which showed a balance of $3,812.79 for the original $20,000 retainer paid by Kloss in the Edward D. Jones tort case. Engel nevertheless had deemed it

appropriate, a month earlier, to modify the CRT termination agreement.

¶33 The Commission's decision allows Engel to merge fee agreements for two separate matters into a single, indecipherable whole. Engel provides an excuse without explanation for each maneuver undertaken by him to increase his fee for work already performed and for which Kloss already had paid. The modified fee agreement for the CRT termination mentions nothing about payment to Engel for legal services in the separate Edward D. Jones tort litigation. Engel's fee of $121,545 in an uncontested proceeding to terminate the CRT cannot be deemed reasonable under any circumstances. We conclude that Engel violated MRPC 1.5.

¶34 *Whether Engel violated Rules 1.15 and 1.18, MRPC, by failing to deposit retainer fees in an IOLTA or client trust account.*

¶35 Engel received a $20,000 retainer from Kloss in accordance with the October 27, 1998, fee agreement. Kloss also paid Engel a $50,000 retainer in January 2002 that Engel claims to have applied to his representation of Kloss in the James conservatorship proceeding. Engel deposited both retainer funds into his operating account. Engel testified that he did not need to place the funds in a trust account because he received the payments as "retainer, engagement fees" that he would earn within a short period of time.

¶36 The Commission concluded that Engel exercised good faith judgment in accordance with Rule

1.18(c)(2)(C), MRPC, in anticipating that the $20,000 retainer had been or would be earned in a short period of time, and, therefore, not subject to the rule's requirement that such funds be placed in a trust account. ODC counters that the Commission misinterpreted Rule 1.18(c)(2)(C), MRPC, and overlooked entirely the $50,000 retainer that Engel also deposited in his operating account.

¶37 All client funds must be deposited into either an IOLTA trust account or "a separate interest-bearing account for a particular client's matter with the net interest paid to the client." Rule 1.18(c)(3), MRPC. The choice whether to place the funds in an IOLTA account or a client trust fund depends on the amount of the fund or the length of time that the amount of funds are to be held. Client funds deemed nominal in amount or held for a short period of time must be deposited in an IOLTA account. Rule 1.18(c)(2)(A), MRPC. Client funds that are not nominal in amount or that are to be held for a long period of time, by contrast, may be deposited in a client trust fund. Rule 1.18(c)(3), MRPC.

¶38 Engel seems to argue, and the Commission seems to accept, that a third category exists for soon-to-be-earned fees. Engel contends that retainers that represent soon-to-be-earned fees may be deposited directly into a lawyer's operating account. We disagree. The rules provide no option for placing client funds directly into a lawyer's operating account.

¶39 The decision as to whether a client's funds are nominal in amount or to be held for a short period of time rests solely within the sound judgment of the lawyer. A lawyer who exercises good faith judgment in determining whether client funds are nominal in amount or to be held for a short period of time shall not be charged with professional misconduct or ethical impropriety related to such decision. Rule 1.18(c)(2)(C), MRPC. Engel could have decided that the $20,000 and $50,000 retainers were to be held for a short period of time in light of his claim that he soon would earn them. In that case, however, Engel should have deposited the retainers in an IOLTA account. The rules provide no option for depositing a client's retainer directly into a lawyer's operating account.

¶40 Rule 1.18, MRPC, when read in its entirety, affords a lawyer a certain amount of discretion in determining whether a client's funds must be placed in an IOLTA account or a client trust fund. Thus, Engel might have faced a legitimate choice between whether to deposit the retainers in an IOLTA account or a client trust account. The rule does not give the lawyer the option, however, of placing the client's funds in the lawyer's operating account. In fact, Rule 1.15, MRPC, forbids the commingling of such funds. The rule requires a lawyer to hold his client's property in connection with representation separate from the lawyer's own property.

¶41 Engel deposited the $20,000 and $50,000 retainers into his operating account rather than

depositing the funds in an IOLTA account or a client trust account. This act violates Rules 1.15 and 1.18, MRPC. We cannot accept, and the rules do not condone, Engel's explanation that he soon would earn the funds, and thereby justify his decision to place the client funds in his operating account.

¶42 *Whether Engel violated Rule 1.7, MRPC, by engaging in a conflict of interest.*

¶43 Rule 1.7, MRPC, forbids a lawyer from representing a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and the client consents after consultation. ODC argues that Engel violated Rule 1.7, MRPC, by representing Parrent in a 1998 petition before the district court for his appointment as conservator of Kloss's estate. ODC contends that such representation constituted a conflict of interest because Engel's representation of Parrent was directly adverse to his representation of Kloss.

¶44 The Commission concluded that no conflict of interest had occurred under Rule 1.7, MRPC, by Engel's brief representation of both Kloss and Parrent in a 1998 conservatorship petition filed by Engel. No court ever appointed Parrent as conservator and, from the record, it appears that Engel and Parrent have not further pursued the matter. The Commission also considered that Engel's efforts in the 1998 conservatorship proceeding may have constituted a

legitimate tactical move in the separate Edward D. Jones tort litigation. Our review of the evidence indicates insufficient support for ODC's claim that Engel violated Rule 1.7, MRPC.

¶45 *Whether Engel violated Rules 1.14, 2.1, 8.4(c), MRPC, by failing to advise his client that a relative had mismanaged her affairs.*

¶46 ODC contends that Engel knew that Parrent had not acted in the best interest of Kloss, and, therefore, violated the duties imposed on a lawyer under Rules 1.14, 2.1, 8.4(c), MRPC. Rule 1.14, MRPC, sets forth a lawyer's responsibility in dealing with a client who lacks the mental ability to make decisions in connection with representation. Rule 2.1, MRPC, outlines the lawyer's role as an advisor, stating that a lawyer "shall exercise independent professional judgment and render candid advice." Rule 8.4(c), MRPC, prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

¶47 No clear and convincing evidence supports the claim that Kloss suffered from a mental disability. Rule 1.14, MRPC, does not apply, therefore, to Engel's representation of Kloss. Our review of the record also reveals a lack of clear and convincing evidence to support a finding that Engel had violated Rules 2.1 and Rule 8.4(c), MRPC.

CONCLUSION

¶48 Engel violated Rule 1.5, MRPC, by charging an unreasonable fee for his legal services in the CRT termination. Engel also violated Rules 1.15 and 1.18, MRPC, by depositing client funds into his operating account.

ORDER

THEREFORE IT IS ORDERED:

¶49 1. We reject the Commission's recommendations as to Counts One and Two.

¶50 2. We adopt the recommendations of the Commission as to Counts Three and Four.

¶51 3. We remand this matter to the Commission for its consideration and recommendation of an appropriate sanction for Engel's violation of Rules 1.5, 1.15, and 1.18, MRPC.

¶52 4. The Clerk of this Court is directed to mail copies of this Order to Joseph Engel, III, by certified mail, return receipt requested, and by ordinary mail to Joseph Engel's attorney, the Chairman and the Secretary of the Commission on Practice, the Office of Disciplinary Counsel, and the Executive Director of the State Bar of Montana.

DATED this 17th day of July 2007.

/S/ KARLA M. GRAY
/S/ BRIAN MORRIS
/S/ JOHN WARNER
/S/ W. WILLIAM LEAPHART
/S/ PATRICIA COTTER
/S/ JAMES C. NELSON
/S/ JIM RICE

No. 05-174

IN THE SUPREME COURT OF
THE STATE OF MONTANA

2008 MT 42

IN THE MATTER OF JOSEPH ENGEL, III, An Attorney at Law. Respondent.	)))))	OPINION AND ORDER

(Filed Feb. 6, 2008)

¶1 We discussed at length the facts giving rise to this matter in *In re Conservatorship of Kloss,* 2005 MT 39, 326 Mont. 117, 109 P.3d 205, and *In re Engel,* 2007 MT 172, 338 Mont. 179, 169 P.3d 345 [hereinafter *Engel I*]. We will repeat here only those facts pertinent to our decision to impose on Engel a sixty-day suspension. The Office of Disciplinary Counsel (ODC) filed a complaint against Joseph Engel, III, (Engel), an attorney licensed to practice law in the state of Montana. We determined that Engel had violated Rules 1.5, 1.15, and 1.18, of the Montana Rules of Professional Conduct (MRPC). *Engel I,* ¶ 48.

¶2 The Commission on Practice of the Supreme Court of the State of Montana (the Commission) held a hearing regarding the appropriate sanction for Engel. The Commission recommends that we impose on Engel a public censure and the costs of the disciplinary proceedings based on the Commission's finding

that several mitigating factors weigh against any harsher sanction. We decline to follow the Commission's recommendation. We conclude that in addition to a public censure and the obligation of the costs of the disciplinary proceedings, Engel's conduct warrants a sixty-day suspension from practice.

STANDARD OF REVIEW

¶3 This Court "possesses original and exclusive jurisdiction and responsibility" in all matters involving the disciplining of lawyers in the state of Montana. *See* Introduction, Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). We review de novo the Commission's findings of fact, conclusions of law, and recommendations. *In re Potts*, 2007 MT 81, ¶ 32, 336 Mont. 517, ¶ 32, 158 P.3d 418, ¶ 32. We weigh the evidence upon which the Commission's findings rest. *Potts*, ¶ 32.

DISCUSSION

¶4 The Commission cites the presence of several mitigating factors to support its recommendation. The Commission first asserts that the Court did not disavow expressly the Commission's finding that Engel "had received $295,000 in fees from Kloss during the period 1998-2005, whereas [Engel] recorded over $330,000 in time and expenses representing Kloss." The Commission cites the fact that Robert James (James), Engel's opposing counsel in the Edward D. Jones litigation, initiated the complaint

against Engel and suggests that James's litigation tactics played a large part in driving up the litigation costs. The fact that Kloss never complained about Engel's work or his fee represents a further mitigating factor in the Commission's view. The Commission asserts that Engel worked "over an extended period of time and achieved positive and beneficial results for [Kloss]." Finally, the Commission cites the negative publicity surrounding Engel's role in this matter as a mitigating factor. We disagree with the Commission with respect to each alleged mitigating factor.

¶5 *Engel's Billable Hours.*

¶6 Engel argues that the Commission understood his fee arrangement with respect to the "overall picture" of his representation of Kloss, which includes: (1) the termination of a Charitable Remainder Trust (CRT); (2) a tort claim against Edward D. Jones, a brokerage firm; and (3) opposition to a petition for the appointment of a conservator for Kloss filed by James, the opposing counsel in the Edward D. Jones litigation. The record fails to support Engel's claim, however, that the "overall picture" of his representation of Kloss justifies his fee.

¶7 Kenneth Parrent (Parrent), Kloss's 71-year-old nephew, executed a fee agreement on Kloss's behalf on July 1, 1998, to have Engel terminate the CRT for an hourly rate of $125. *Engel I,* ¶ 9. Engel's billing records indicate that he performed 65.9 hours of work in terminating the CRT. *Engel I,* ¶ 9. Kloss paid

Engel $8,362.50 for this work in 1998 according to the terms of the hourly fee agreement. *Engel I,* ¶ 9.

¶8 Engel signed a second fee agreement with Kloss on October 27, 1998, relating to the tort action against Edward D. Jones. *Engel I,* ¶ 10. The second fee agreement provided that Engel would bill Kloss at an hourly rate of $125 from an original $20,000 retainer provided by Kloss. *Engel I,* ¶ 11. This second agreement further provided that Engel would receive thirty-five percent of any recovery in the action against Edward D. Jones. *Engel I,* ¶ 11. The agreement makes no mention of any arrangement, however, whereby Kloss would fund the Edward D. Jones litigation from the proceeds of the CRT.

¶9 The parties presumably intended the original $20,000 retainer to fund the Edward D. Jones litigation. Kloss provided an additional $50,000 retainer in 2002. *Engel I,* ¶ 11. Engel's accounting practices make it impossible to determine to which litigation this $50,000 retainer applied. Engel did not place either the $20,000 retainer or the $50,000 retainer in his trust account. Engel instead placed both retainers directly into his operating account. *Engel I,* ¶ 11. We determined that these actions, standing alone, violated Rules 1.15 and 1.18, MRPC. *Engel I,* ¶ 41.

¶10 Engel justified the size of the fee for his work in pursuing the uncontested dissolution of the CRT, in part, on the separate action in which James petitioned for a conservator for Kloss. Engel also asserted that he used the $50,000 retainer to cover the cost of

his work in contesting James's petition for a conservator. *Engel I,* ¶ 11. Engel changed the fee agreement for terminating the CRT on February 1, 2000. James did not petition for the appointment of a conservator for Kloss until June 2003 – about 18 months after Engel received the $50,000 retainer and several years after Engel modified the fee agreement for terminating the CRT. *Engel I,* ¶¶ 11-12.

¶11 The Commission gives Engel the benefit of the doubt in suggesting that he properly earned these retainers and the remaining fee of nearly $130,000 that he received for the Edward D. Jones litigation. We decline to provide Engel with this benefit in light of the numerous inconsistencies in the record. Engel's billing records, the various fee agreements, and Engel's shifting explanations for his accounting practices raise more questions than provide answers.

¶12 We concluded that Engel's fee in collecting $121,545 for his work in an uncontested proceeding to terminate the CRT "cannot be deemed reasonable under any circumstances." *Engel I,* ¶ 33. This conclusion invalidates more than one-third of the total amount that Engel received and, at the very least, raises questions regarding the validity of Engel's remaining fee. The record does nothing to resolve those questions. The Commission's recommendation, on the other hand, validates the remaining two-thirds of Engel's fee and implicitly challenges our conclusion that Engel's after-the-work-was-performed modification of the fee agreement from an hourly fee to a

contingency fee could not be justified "under any circumstances."

¶13 The ODC's amended complaint against Engel did not address specifically the entire scope of Engel's representation of Kloss. As a result, we did not resolve the legitimacy of the remaining two-thirds of Engel's fee. We see no mitigation in the fact that we did not repudiate explicitly the Commission's finding relating to an issue not germane to our review.

¶14 *James's Filing of Complaint.*

¶15 The Commission continues to advance as a mitigating factor the fact that James, Engel's opposing counsel, initiated this complaint and employed "tactics" that allegedly drove up Kloss's expenses, including James's filing of a petition for a conservator for Kloss. A disinterested District Court held a hearing on James's petition. We commend to the Commission the District Court's Findings of Fact, Conclusions of Law and Order, Ex. 76, and the transcript of the hearing on James's petition, Ex. 75, before they imply that James filed the petition to gain a tactical advantage in the litigation with Edward D. Jones.

¶16 The District Court addressed the issue of whether to appoint a conservator for Kloss when faced with the fact that Kloss's former nearly $1,000,000 estate had a value of less than $5,000 at the time of the hearing. Kloss generally could provide no explanation for the precipitous drop.

¶17 The District Court found that Kloss remained oblivious to her financial state and that her nephew, Parrent, had squandered a large part of her estate. Specifically, Kloss did not know that she had deeded to a Colorado corporation a 4,000 square foot house located in Fairfield, Montana, that she recently had purchased. The Colorado corporation, established by Parrent, had no employees, income, or expenses. The District Court stated that the corporation "appears to be a shell. . . ." Kloss was unaware that Parrent had been using her money to pursue legal and private investigative services in Colorado for his personal matters. Kloss did not know that she had suffered a $167,000 loss in one year in her brokerage account. Kloss did not know that she had borrowed funds by way of a margin account and that she had paid nearly $75,000 in interest on these funds. Kloss testified that she had never used the margin account.

¶18 The District Court further found that Parrent had led Kloss to believe that the CRT eventually would divest Kloss of her entire estate. The District Court determined that Parrent had failed to explain to Kloss that, rather than losing her entire estate, she would have retained $650,000 outside the CRT and earned seven percent annual interest on the $350,000 principal of the CRT until her death.

¶19 The District Court found that Parrent had no means of support outside of Kloss. He lived in the house that Kloss had deeded to his shell corporation. He drove a car that Kloss had bought for his shell corporation. Parrent also served as the sole support

for his live-in fiancé. Despite having no other means of support, Parrent somehow satisfied $200,449 worth of his federal income tax liens in September of 2000.

¶20 The District Court also found that Parrent had taken over Kloss's investment decisions. According to the stock broker, Parrent "was trying to make money by buying and selling stocks." The District Court found that Parrent had begun investing in "aggressive, volatile, and risky securities."

¶21 Finally, the District Court found that shortly before it had entered its order freezing Kloss's assets and ordering Parrent not to exercise his power-of-attorney, Parrent emptied more than $156,000 from Kloss's brokerage account. Parrent could give no accounting as to what had happened to Kloss's money. Parrent did not take all of his aunt's money. He left Kloss about $950.

¶22 James learned all of this information during the discovery phase of the Edward D. Jones litigation. James, an attorney bound by the Rules of Professional Conduct, had little choice in the face of this avalanche of avarice. Engel nevertheless seeks to disparage James and his motives for petitioning for a conservator for Kloss. The Commission characterizes James's petition as a "tactic" that "[drove] up the litigation costs" and implies that James inappropriately initiated the complaint against Engel.

¶23 The District Court specifically found that James received no compensation for seeking the appointment of a conservatorship. The District Court

further determined that James "undertook this matter to protect Mrs. Kloss, and not for any other or improper purpose." Indeed, the fact that Engel filed a petition to appoint Parrent as a conservator for Kloss in 1998 supports the notion that Kloss needed protection. Engel represented to the court in that petition that Kloss needed a conservator due to her "age and failed health" and her "inability to function independently." Engel withdrew the petition based solely upon opposition from relatives to the appointment of Parrent as the conservator, and not based upon a changed perception regarding Kloss's ability to manage her affairs.

¶24 More importantly, Rule 8.3(a), M.R.P.C., specifically requires a lawyer to inform the ODC of another lawyer's "violation of the Rules of Professional Conduct." We determined that Engel had violated three separate rules. *Engel I,* ¶ 48. Designating James's reporting of these violations as a mitigating factor undermines a lawyer's duties pursuant to Rule 8.3(a), M.R.P.C. We refuse to encourage members of the bar to sit on their hands in the face of potential misconduct by opposing counsel.

¶25 *No Complaint By Kloss.*

¶26 The Commission cites Kloss's failure to complain about Engel's legal services or the fees that he charged for those services as mitigating the effects of Engel's ethical violations. Kloss's testimony at the hearing for the appointment of a conservator belies

any apparent satisfaction with Engel's legal services and the fees that he charged.

¶27 Kloss testified that she had paid Engel several thousand dollars to terminate the CRT. We now know that Kloss paid Engel more than $121,000 to terminate the CRT pursuant to Engel's after-the-work-was-performed modification of the fee agreement. The District Court found that Parrent had written all the checks for legal fees to Engel and that Kloss did not "understand or appreciate how much was spent in attorney's fees, or whether that is a proper amount to spend in attorney's fees for the work that was performed."

¶28 Kloss testified in that same proceeding that she had paid Engel $2,500 in legal fees in the Edward D. Jones litigation. We now know that Engel accrued fees in that litigation in the neighborhood of $200,000. Kloss testified at the hearing in 2003 that she had paid Engel about $7,500 in total legal fees when in fact she had paid Engel more than $300,000. It comes as no surprise, therefore, that Kloss would have "no complaint" regarding Engel's fee. We disagree with the Commission's view that Kloss's apparent satisfaction with Engel's legal services and his fees constitutes a mitigating factor in light of this testimony.

¶29 *Positive and Beneficial Results for Kloss.*

¶30 The Commission determined that Engel's work produced "positive and beneficial results" for Kloss. Our decision in *Kloss v. Edward D. Jones & Co.*, 2002

MT 129, 310 Mont. 123, 54 P.3d 1, emerged from Kloss's action. The *Edward D. Jones* litigation established the important principles that the brokerage contract at issue constituted a contract of adhesion and that, as a result, no party could enforce the contract's arbitration provision. *Edward D. Jones,* ¶¶ 27, 32. More importantly, for our purposes, the Court held that the broker owed Kloss a "fiduciary duty" that included explaining the consequences of the arbitration provision. *Edward D. Jones,* ¶ 38. Engel pursued litigation that established a fiduciary duty for brokers while he committed abuses of the fiduciary duties that he owed to his client in that same litigation.

¶31 The parties eventually settled the action with Edward D. Jones agreeing to pay $150,000 to Kloss. Engel "waived" any further fee in the *Edward D. Jones* case. We note that Engel "waived" any further fee only after James had filed a petition for the appointment of a conservator, after the District Court had denied Engel's motion to dismiss the petition, after Engel allegedly had expended $77,338.22 in resisting the appointment of a conservator for Kloss, and shortly before the District Court held a hearing on James's petition.

¶32 Kloss already had paid Engel roughly $200,000 in the case. Though Engel's accounting practices make precision impossible, Kloss appears to have suffered a net loss of $50,000 by pursuing the claim against Edward D. Jones. We fail to discern on the

record before us any "positive and beneficial results" for Kloss.

¶33 *Negative Publicity for Engel.*

¶34 Finally, the Commission cites as a mitigating factor Engel's testimony that "press publicity about the Kloss litigation and his role in it has been ruinous to his reputation and law practice." Engel elected to assist Parrent in undoing Kloss's CRT and filing a tort action against Edward D. Jones. Engel drafted all of the fee agreements at issue. He had ready access to the same information presented to the District Court at the hearing on James's petition to appoint a conservator for Kloss. Engel's claim brings to mind the saying that "a boy cannot kill his own parents and then plead for mercy upon himself because he is a poor orphan boy." *Berry v. Jorris,* 199 S.W.2d 616, 619 (Ky. 1947).

CONCLUSION

¶35 We fail to find persuasive any of the alleged mitigating factors cited by the Commission. The circumstances surrounding Engel's conduct leave us unable to follow the Commission's recommendation. Accordingly, it is hereby ordered that:

¶36 1. Joseph Engel, III, appear before the Supreme Court of the State of Montana on March 18, 2008, at 1:15 p.m. for the administration of a public censure;

¶37 2. Joseph Engel, III, pay, or make arrangements to pay, the costs of the proceedings before the Commission. Pursuant to Rule 9(A)(8), MRLDE, Disciplinary Counsel is directed to assemble and serve upon Joseph Engel, III, an itemized list of the costs and expenses incurred in this matter. Joseph Engel, III, shall then have ten days thereafter to file written objections and, if he desires, to request a hearing before an Adjudicatory Panel;

¶38 3. Joseph Engel, III, shall be suspended as attorney and counselor for a period of sixty days, commencing as of the date of the public censure, at the expiration of which time, upon payment of all costs incurred in this proceeding, he may resume the practice of law without further order.

¶39 4. The Clerk of this Court is directed to mail copies of this Order to Joseph Engel, III, by certified mail, return receipt requested, and by ordinary mail to Joseph Engel's attorney, the Chairman and the Secretary of the Commission on Practice, the Office of Disciplinary Counsel, and the Executive Director of the State Bar of Montana.

DATED this 6th day of February 2008.

/s/ Karla M. Gray
Chief Justice

/s/ Brian Morris

/s/ John Warner

/s/ Jim Rice

Justices

Justice W. William Leaphart dissenting.

¶40 I dissent. Given that the Commission on Practice has twice considered this matter and has had the benefit of hearing the witnesses firsthand, I would defer to the Commission's recommendation that Mr. Engel be subject to a public censure and be responsible for the costs of the disciplinary proceedings.

/s/ W. William Leaphart
Justice

Justice James C. Nelson and Justice Patricia Cotter join the the dissent of Justice Leaphart.

/s/ James C. Nelson

/s/ Patricia Cotter

Justice

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 05-174

IN THE MATTER OF JOSEPH ENGEL, III, An Attorney at Law, Respondent.	ORDER

(Filed Mar. 13, 2003)

Respondent Joseph Engel, III, (Engel) has filed a motion for leave to file a petition for withdrawal of opinions, dismissal, and request for oral argument. Engel alleges that the process by which the Court has reviewed his disciplinary proceeding has deprived the Court of subject matter jurisdiction over the formal complaint filed by the Office of Disciplinary Counsel (ODC) against Engel. The ODC has filed a brief in opposition to Engel's motion.

The Court agrees that Engel has raised concerns that warrant full consideration by this Court. Engel's decision to raise this matter at this late date, however, imposes challenges for the Court in light of the scheduled public censure of Engel for March 18, 2008. The Court nevertheless deems it appropriate to consider Engel's claims. Accordingly,

IT IS HEREBY ORDERED that Engel's appearance to appear before this Court for a public censure on March 18, 2008, is VACATED.

IT IS FURTHER ORDERED that the parties shall file briefs limited to the issue of this Court's subject matter jurisdiction pursuant to the following schedule:

- Engel shall file his brief, not to exceed 5,000 words, within twenty days of the date of this Order;
- ODC shall file a response to Engel's brief, not to exceed 5000 words, within twenty days of the filing of Engel's opening brief;
- Engel shall have the option to file a reply brief, not to exceed 3,000 words, within ten days of the date of the filing of ODC's response brief.

The Court will look with disfavor upon any request for extensions of time to this briefing schedule and will grant extensions only when exigent circumstances warrant such an extension.

The Clerk of the Supreme Court is directed to provide immediate telephonic notice of this Order to all counsel of record and to mail copies of this Order to all counsel of record.

DATED this 13th day of March 2008.

/s/ Karla M. Gray
Chief Justice

/s/ Brian Morris

/s/ Patricia Cotter

/s/ James C. Nelson

/s/ John Warner

/s/ W. William Leaphart

/s/ Jim Rice

Justices

BEFORE THE COMMISSION ON
PRACTICE OF THE SUPREME COURT
OF THE STATE OF MONTANA

* * * * * * * * * * * * * *

IN THE MATTER OF JOSEPH ENGEL, III, An Attorney at Law, Respondent.	)))))))	Supreme Court Cause No. 05-174 ODC File Nos. 04-074 and 04-192 **RECOMMENDATION FOR DISCIPLINE**

(Filed Oct. 25, 2007)

This matter came on regularly for hearing on remand pursuant to the Supreme Court's order dated July 17, 2007, before the Commission on Practice ("Commission") at Helena, Montana on Friday, September 21, 2007. Commission members present and participating as an adjudicatory panel were Jim Jacobsen, Jim Canan, Chairman John Warren, Jo Ridgeway, Steve Brown, Sarah Etchart and Gary Davis. Disciplinary Counsel Shaun R. Thompson appeared. Joseph Engel was represented by James C. Bartlett. The parties presented oral and documentary evidence supporting their respective contentions with regard to discipline. From the evidence presented, the Commission makes the following findings of fact:

1. The panel rejected some of the matters urged by ODC in aggravation of the court's conclusion of law that Engel charged an excessive fee under Rule 1.5 MRPC, and violation of Rules 1.15 and 1.18 regarding

deposit of client funds in a trust account. The adjudicatory panel found no evidence that Engel had a selfish motive or sought to enrich himself through his representation of Alice Kloss. While ODC alleged that Engel created confusion in defending himself through his unclear accounting system, the panel does not find clear and convincing evidence of Engel's use of his accounting procedures for purposes of subterfuge. The panel also rejected ODC's contention that vulnerability of his client should be an aggravating factor because clear and convincing evidence established that Kloss was alert, understood, and authorized Engel's representation on her behalf, and that Engel did not take advantage of her.

2. The panel makes no finding on ODC's recommendation that Engel be required to disgorge approximately $121,450, represented to be the amount of excessive fees charged by Engel. The panel notes that there is a pending action in district court, Cascade County, in which Great Falls attorney Kraig Kazda, as successor conservator of the Kloss estate is seeking to recover a similar amount from Engel. The panel defers to the decision to be rendered in that proceeding.

3. A strong mitigating factor appears in paragraph 29 of the panel's November 20, 2006 Findings, Conclusions and Recommendations, which found that Engel had received $295,000 in fees from Kloss during the period 1998-2005, whereas Respondent recorded over $330,000 in time and expenses representing

Kloss. The court did not disapprove of or modify that finding.

4. Other mitigating factors include the fact that Engel provided substantial legal services in unique and strongly contested litigation for Kloss over an extended period of time and achieved positive and beneficial results for her. His efforts resulted in a major decision from the court regarding mandatory arbitration in securities litigation. No complaint was ever made by Kloss to the work performed by Engel or the fees being charged, albeit under several somewhat inconsistent fee agreements. Finally, the instant proceedings were initiated through the complaint of the Great Falls attorney who was Engel's adversary in bitter and protracted litigation. The opposition's tactics played a large part in driving up the litigation costs incurred by Kloss.

5. The panel also notes Engel's testimony that press publicity about the Kloss litigation and his role in it has been ruinous to his reputation and law practice.

From the foregoing Findings of Fact, the Commission on Practice makes the following:

RECOMMENDATION

Upon consideration of the evidence presented, four members of the panel recommend imposition of a public censure by the court together with imposition of costs of the proceedings. The remaining three

members recommend imposition of a private admonition together with imposition of costs.

DATED this 23 day of October, 2007.

/s/ John Warren
John Warren, Chairman

IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN THE MATTER OF JOSEPH C. ENGEL, III, An Attorney at Law, Respondent.	Supreme Court Cause No. 05-174 ODC File Nos. 04-074 and 04-192 ORDER

(Filed Dec. 6, 2006)

On March 25, 2005, by request of a review panel of the Commission on Practice (COP), the Office of Disciplinary Counsel of the State of Montana (ODC) filed a Complaint charging Joseph C. Engel, III (Engel), an attorney at law admitted to practice before the courts of Montana, with professional misconduct. A Citation to Appear and Answer the Complaint was issued the same day and Engel acknowledged receipt of the Citation and Complaint on March 25, 2005. On November 9, 2005, Engel filed his Answer to the Complaint generally denying the allegations and requesting that the COP enter findings of fact and conclusions of law that he committed no professional misconduct which warrants any disciplinary action against him and that the Complaint be dismissed in its entirety. ODC filed an Amended Complaint on July 27, 2006, and on August 14, 2006, Engel filed his Answer to Amended Complaint again generally denying the allegations, requesting the COP to enter findings of fact and

conclusions of law that he committed no professional misconduct which warrants any disciplinary action against him and that the complaint be dismissed in its entirety. The COP filed its findings of fact, conclusions of law and recommendations acceding to Engel's request on November 20, 2006.

Shaun R. Thompson, Disciplinary Counsel, has filed his notice that he will not be filing objections to the COP's findings of fact, conclusions of law and recommendation because Rule 16, of the Rules for Lawyer disciplinary Enforcement (2002) (RLDE, 2002) provide that while the respondent attorney may file objections to the COP's findings, conclusions and recommendations, there is no reciprocal provision for Disciplinary Counsel to file objections. Indeed, Rule 16 is written from the premise that the COP is recommending some form of discipline against the respondent attorney. In this case, however, the COP is not recommending discipline against Engel, but that the complaint against him be dismissed entirely.

Although our review of disciplinary proceedings is *de novo,* we are not inclined to conduct our review of contested cases, such as the one here, in a vacuum without argument of counsel. In order to assist our review of this cause, we conclude that it is appropriate that we entertain briefs from counsel on the COP's findings of fact, conclusions of law and recommendation and that we set a briefing schedule. Therefore

IT IS ORDERED that Disciplinary Counsel is granted the option in which to prepare, file and serve his objections to the COP's November 20, 2006, findings of fact, conclusions of law and recommendation in this cause. If Disciplinary Counsel chooses to file objections, he shall do so within 30 days from the date of this order. Thereafter, Engel shall have 30 days in which to file an answer to Disciplinary Counsel's objections, and Disciplinary Counsel shall have 14 days for reply.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this order to Counsel of record, including Engel's counsel James C. Bartlett, and to Disciplinary Counsel, Shaun R. Thompson, and to John Warren, Chairman of the COP and to Shauna Ryan, Office Administrator of the COP.

DATED this 6th day of December 2006.

Chief Justice

/s/ James C. Nelson

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ Brian Morris

/s/ John Warner

/s/ Jim Rice

Justices

Chief Justice Karla M. Gray dissenting.

I dissent from the Court's order. Our Rules do not provide for objections by the ODC, and I would not make this exception for this particular case. If we want to revise our Rules, we should do so. Otherwise, we should follow them as we expect everyone else to do.

/s/ Karla M. Gray
Chief Justice

BEFORE THE COMMISSION ON PRACTICE
OF THE SUPREME COURT OF
THE STATE OF MONTANA

* * * * * * * * * * * * * *

IN THE MATTER OF JOSEPH ENGEL, An Attorney at Law, Respondent.	)	Supreme Court Cause No. 05-174 ODC File Nos. 04-074 and 04-192 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**

(Filed Nov. 20, 2006)

This matter came on regularly for hearing before the Commission on Practice ("Commission") at Great Falls, Montana on Friday, September 22, 2006. Commission members present and participating as an adjudicatory panel were Jim Jacobsen, Jim Canan, Chairman John Warren, Jo Ridgeway, Steve Brown and Gary Davis. Disciplinary Counsel Shaun R. Thompson appeared. Joseph Engel was represented by James C. Bartlett. The parties presented oral and documentary evidence supporting their respective contentions. From the evidence presented, the Commission makes the following findings of fact:

OVERVIEW

Respondent Joe Engel ("Engel") performed legal services for Alice Kloss ("Kloss"), a Great Falls resident in her 90's over a period of more than seven years until her death in 2006. He was first retained in connection with termination of a charitable remainder trust which Kloss executed May 19, 1998 (Exhibit 20), (the "CRT proceedings"), and later Engel represented her in civil litigation against Kloss' stockbroker Edward D. Jones and its agent Paul Husted ("Jones litigation"), which involved an appeal to the Montana Supreme Court regarding applicability of an arbitration clause in the brokerage agreement (June 13, 2002 decision at Exhibit 522), and defended a subsequent attempted appeal by Jones to the U.S. Supreme Court. Later, he resisted a petition for conservatorship of Kloss brought by Great Falls attorney Bob James (the "conservatorship litigation"). Engel also at one point filed a petition on behalf of nephew Parrent for conservatorship of Kloss, which did not progress to hearing and was later withdrawn. Engel also prepared wills and trusts for Kloss when the litigation was concluded.

The testimony presented at the nine hour hearing focused primarily on the fee arrangements that Engel had with Kloss from 1998 to 2003.

FINDINGS OF FACT

1. The Respondent, Joseph C. Engel, III, was admitted to the practice of law in the State of Montana in 1974, and at all times pertinent hereto has continually been under the jurisdiction of the Montana Supreme Court as a member of the State Bar of Montana on active status.

2. On July 27, 2006, the Office of Disciplinary Counsel ("ODC") filed a formal complaint against Respondent that contained four counts.

3. Count One involves allegations that the fee Respondent charged and received for legal services rendered in terminating a charitable remainder trust ("CRT"), $121,545 or thereabout, was unreasonable and in violation of Rule 1.5, Montana Rules of Professional Conduct ("MRPC") (prior to amendment on April 1, 2004).

4. In Count Two, ODC alleges that, in violation of MRPC 1.15 (Safekeeping Property) and 1.18 (IOLTA), Respondent did not deposit certain funds in a trust account and took fees before they were earned.

5. In Count Three, ODC alleges that Respondent had a conflict of interest when he represented Kenneth Parrent ("Parrent") in the conservatorship proceedings involving Alice Kloss. ODC alleges that Respondent violated MRPC 1.7 (prior to amendment on April 1, 2004).

6. Count Four involves allegations regarding Respondent's failure to properly represent a client

under a disability. Specifically, ODC alleges that Respondent violated MRPC 1.14, 2.1, 8.4(c) and other ethical duties, by failing to advise his client of Parrent's mishandling of her affairs and otherwise taking measures to protect her. It is alleged that Respondent acted in his own self-interest.

7. Kloss was born November 26, 1906. She died April 22, 2006 at the age of 99. Until 1998, Kloss had no living relatives in Montana. Her husband died in 1981 and she had no children.

8. In 1998, Alice Kloss was residing in Great Falls, Montana. She was mentally competent, and was living unassisted in her own apartment, and driving herself about in her own automobile.

9. On May 19, 1998, Kloss created a CRT. The corpus of the CRT consisted of $365,000 from Kloss' approximately $1 million estate. The balance of Kloss' funds remained in her possession. Within months, Kloss had second thoughts and her first consultation with Engel was to discuss her desire to terminate the trust agreement.

10. On or about May 28, 1998, Kloss requested that Kenneth Parrent, her 71 year old nephew, move from Colorado to Great Falls to assist in the care of Kloss' affairs.

11. On June 15 and 19, 1998 respectively, Mrs. Kloss had attorneys Don Hamilton and Alex Blewett Sr., respectively each prepare separate durable powers of attorney naming Parrent as attorney in fact,

which vested him with not only general powers of attorney to handle Kloss' affairs, but also a specific power of attorney to address the CRT in particular. Kloss then retained the Respondent for legal services.

12. Engel's first fee agreement (ODC Exhibit 1) dated July 1, 1998 was with Kloss and Parrent, although it was only signed by Parrent, operating under the powers of attorney from Kloss. Transcr. 185:7-10. Engel was to terminate the irrevocable charitable remainder trust executed by Kloss, by litigation if necessary, at $125 per hour.

13. On September 21, 1998, Respondent, on Kloss' behalf, filed a petition to terminate the CRT. (Exhibit 21.) All of the beneficiaries voluntarily relinquished their interest in the CRT. On October 14, 1998, the District Court terminated the CRT. (Exhibit 22.)

14. Engel's second fee agreement with Kloss (Exhibit 2) was dated October 27, 1998, directed to asserting a claim against Jones for damages arising out of creation and funding of the CRT. It was claimed that Husted included some charities with which he had a relationship as remaindermen. A $20,000 retainer was paid, and Engel was to work against the retainer at $125 per hour. Any recovery was to be divided 35% to Engel and 65% to Kloss. Respondent did not place the said $20,000 in his trust account.

15. On December 28, 1998, Respondent filed the complaint in *Alice P. Kloss v. Edward Jones and Paul*

Husted, Cause No. ADV-98-1542 in the district court of the Eighth Judicial District. The Defendants in that case, Edward Jones and Paul Husted, retained attorney Robert F. James to defend the suit. Initially, James filed a Motion to Compel Arbitration in the district court. In June, 2002, the Montana Supreme Court entered the decision *Alice P. Kloss v. Edward Jones and Husted,* 2002 MT 129, 310 Mont. 123, 54 P.3d 1, a landmark decision on the issue of arbitration. It held, among other things, that Husted had breached his fiduciary duty to Kloss by not explaining the arbitration clauses to her and further that these clauses were beyond Kloss' reasonable expectations, and were not enforceable against her. Defendants Edward Jones and Husted filed an unsuccessful petition for rehearing to the Montana Supreme Court. They then filed a Petition for Writ of Certiorari to the United States Supreme Court. That petition was denied. *Edward D. Jones & Co., v. Alice P. Kloss,* 538 U.S. 956, 123 S. Ct. 1633 (Mar. 31, 2003). Ultimately, this litigation settled in November 2003 for $150,000 to Kloss.

16. By letter dated February 1, 2000, Engel revised the fee arrangement (Ex. 3), referring to termination of the CRT as a contingent fee arrangement, noting recovery of $365,000, with $121,545 to Engel on a contingent 1/3rd, less $8,975.49 already paid, for a balance due to him of $112,569.51. By that time, however, the CRT proceedings had been successfully concluded. Persons unknown prepared a consent form at the bottom right of the letter which

was signed by Kloss on February 22, 2000. At hearing, Engel contended that he did not see the signed consent until considerably later in discovery. Transcr. 208:2-10.

17. By letter dated July 5, 2000 (Ex. 62) to Parrent as attorney in fact for Kloss, Engel further refined the fee agreement, acknowledging receipt of $10,000, and confirming that he was to receive monthly installments of $10,000 each on the agreed upon fee of one-third of the amount recovered through termination of the CRT, for a total of $70,000.

18. Exhibit 4 titled "Supplemental Attorney-Client Fee Agreement" is dated October 3, 2003, and recites that it replaces entirely the retainer agreement dated July 1, 1998 and "is retroactively effective from that date." The agreement goes on to recite that attorney Engel is entitled to recover 33 1/3% of the $365,000 in the CRT proceedings, which sum attorney is attempting to recover for client in the Jones litigation.

19. All of the fee arrangements after the initial July 1, 1998 agreement were executed after the court had ordered termination of the CRT on October 14, 1998. The above described fee agreements are confusing and inconsistent, shifting back and forth from hourly to contingent fee, with continued references to termination of the CRT. Engel declined to agree that Exhibit 2 was a contingent fee agreement, describing it as a "proportional fee" agreement. Transcr. 228:18-229:15. However, Kloss and Parrent approved the

various fee agreements and modifications. Transcr. 228:18-229:15.

20. During discovery and as trial approached in the Jones litigation, Engel attempted to position Kloss and himself to make the maximum claim possible for an award of attorney's fees if Kloss prevailed and the court was disposed to grant fees. This may have been the primary motivation behind the various fee agreements which followed the initial one dated July 1, 1998. Engel admitted as much. Transcr. 286:24-287:20.

21. Engel did submit detailed periodic fee statements to Kloss, all of which were not questioned and paid without question or complaint.

22. Exhibit 48 showed that Kloss paid Engel a total of $295,862.54 in legal fees and costs. Exhibit 50, an ODC exhibit, shows how the fees were allocated to the various projects handled by Engel. Of that, $77,338.22 is attributable to resisting James' petition for conservatorship (Exhibit 510), which included an appeal to the Montana Supreme Court. An additional $8,925.50 was expended on the CRT termination. Engel also did some estate planning work for Kloss, two wills and several trust agreements, at $2,525. Most of the balance was expended in the Jones litigation, including the issue of the arbitration clause, with appeal to the Montana and U.S. Supreme courts, $29,133.21 of that amount for resisting the writ of certiorari. Engel also assisted Missoula counsel in a separate action in which Kloss

sued another broker Dain Rauscher. Exhibit 50 shows that a total of $214,554.56 was expended in the Jones litigation. Exhibit 523 is the docket and summary of docket entries in the Jones litigation, also listing all of the attorneys involved. Detailed fee statements were introduced showing Engel's activities, day by day.

23. As a result of Engel's efforts, $365,000 was returned to Kloss when the charitable remainder trust was revoked by court order. On the eve of trial, the Jones litigation was settled and there was a recovery of $150,000 less Engel's fees and costs. Engel contended that but for a recent U.S. Supreme Court decision restricting punitive damages, he would have recovered substantially more for Kloss at jury trial.

24. In the Jones litigation, Engel faced a very strenuous defense by Jones' defense counsel Bob James. Engel described the litigation defended by James as a "war that lasted longer than World War II" Transcr. 211:2-4. On or about June 16, 2003, Mr. James and his associate, Cathy Lewis filed a petition (Ex. 69) in another department of the Eighth Judicial District to seek the involuntary appointment of a conservator for Alice Kloss. This petition was filed *ex parte,* with service on Parrent, but without notice to either Respondent or Mrs. Kloss, despite the fact that James knew Kloss was represented by Respondent. However, James testified at hearing that he had discussed filing the petition with Engel earlier in June. Transcr. 24:3-7. The James petition for involuntary appointment of conservator of Mrs. Kloss,

supported by affidavits signed by Mr. James and Ms. Lewis, recited that Parrent had received over $200,000 of Kloss' money. At paragraph 5 of the petition, James said he believed that $450,000 of Kloss' funds had been spent on attorney's fees and to support Parrent. On June 16, 2003, Judge Kenneth Neill entered an *ex parte* order suspending Parrent's power of attorney, preventing him from further handling Kloss' affairs. Such order came at a critical time when Parrent was needed to assist Kloss in preparing for her lawsuit against Edward Jones and Husted. James was then in an adversarial relationship with Kloss, who had a pending lawsuit against James' client Jones. The filing of that petition appeared to be tactically timed to derail jury trial against his client Jones. The court order on the petition also casts doubt on the mental capacity of Kloss which would have had substantial repercussions on her ability to testify to a jury. Transcr. 209:10-210:7; 210:16-211:1. As the lawsuit was settled shortly thereafter, no trial took place. In close time proximity James also filed notice of a video discovery deposition of Kloss for June 18, 2003 (Exhibit 71) but it was unclear when Kloss was served with notice. Hearing on the merits of petition did not take place until November 23, 2003 (Exhibit 75), and the court did not rule until March, 2004 (Exhibit 76), at which time the petition was granted, and subsequently Great Falls attorney Kraig Kazda was appointed as conservator. Kloss appealed on the basis that James did not have standing to bring the petition for appointment of conservator. The supreme court affirmed the district court on February

22, 2005 (Exhibit 80). The timing and nature of James' petition was commented upon by the supreme court:

> This conservator will investigate whether James' petition was designed to intimidate Kloss or whether his "outrageous accusations" regarding the conduct of Parrent and Engel withstand scrutiny. (paragraph 17, Exhibit 80)

25. James' tactics greatly increased the pressure on Engel in conducting discovery and preparing for jury trial and substantially increased the fees charged by Engel to Kloss.

26. While it was claimed that various components of the fees charged for various legal projects were excessive, Engel and his counsel took the position that the use of the plural "fees" in former Rule 1.5(a), means that a broad approach is to be taken in a situation where a lawyer handles various matters for a client over an extended period of time. Engel also argued that his fees were "proportional." Transcr. 228:18-229:15. The panel members applied various factors such as novelty of the subject matter, the fact that litigation took place in multiple forums, the time expended and the difficulty of the various projects, along with the other factors stated in the rule.

27. Considering all the facts and circumstances, Engel's fees were not unreasonable in light of the factors to be considered under former Rule 1.5(a) MRPC. By comparison, James testified that he was

paid $161,000 (fees of $152,000) for defending Jones. Transcr. 80:6-11. James had little involvement in the attempted appeal to U.S. Supreme Court. Transcr. 52:7-14.

28. Taken as a whole, Engel's legal charges of almost $296,000 (ODC Exhibit 48), all at $125 per hour (Transcr. 172:21, 173:24, 228:407), except for several hours charged in resisting the appeal to U.S. Supreme Court at $200 per hour, were not excessive.

29. The evidence shows that Respondent received $295,000 in funds to cover costs and fees from Mrs. Kloss in the period 1998-2005, whereas Respondent recorded over $330,000.00 in time and expenses incurred representing Mrs. Kloss during this time period.

30. In view of the fact that the funds which Respondent received from Mrs. Kloss do not exceed the value of the services which Respondent rendered to her, the claim that Respondent received excessive fees from his client in violation of Rule 1.5 MRPC, is not substantiated by clear and convincing evidence.

31. With respect to Count Two (Rules 1.15 and 1.18), the law was unclear when the October 27, 1998 fee agreement (Exhibit 2) was signed whether Engel was required to deposit the $20,000 advance payment from Kloss in his IOLTA trust account. At the time, he was expending considerable time and effort on Kloss' behalf and in any event "earned" the fee within a few weeks.

32. Rule 1.18(c)(2) MRPC states "The determination of whether a client's funds are . . . to be held for a short time period [and therefore not required to be placed into an IOLTA trust account] rests solely in the sound judgment of each lawyer/firm. No charge of professional misconduct or ethical impropriety shall result from a lawyer's exercise of good faith judgment in that regard." Engel exercised good faith judgment, anticipating that the $20,000 had been or would be earned in a very short period of time.

33. With respect to Count Three, there was no conflict of interest under MRPC 1.7 when Engel briefly represented both Kloss and nephew Parrent. The panel was troubled by the fact that Engel filed a petition on June 16, 2003 (Exhibit 53) on behalf of Parrent, seeking his appointment as conservator for his aunt Kloss. It would seem that a lawyer could not represent both the petitioner and the person who is the subject of the petition, when there are allegations of mental incapacity. However, Engel, at all times had the confidence and trust of Kloss, who never complained in any fashion regarding their relationship, and the petition was never pursued to hearing. Transcr. 229:16-231:1. Engel's efforts were directed primarily to the pending trial in the Jones litigation, and the petition may have been a tactical move.

34. Count Four of the Complaint assumes that Mrs. Kloss was a "client under disability" and that Respondent "knew or should have known . . . Kloss ability to make adequately considered decisions was impaired." With respect to these allegations, ODC

produced no evidence to establish that Kloss was in any way mentally impaired. The evidence showed that Kloss was competent during relevant periods of time.

35. Kloss had named Parrent in powers of attorney before Respondent became involved in Kloss' affairs. Consequently, Respondent was under no duty to ascertain whether or not Kloss had any ability to make adequately considered decisions, since she had delegated all decision making authority to Parrent.

36. Kloss was never under a disability. There were various statements from health care providers (Dr. Buffington, ODC Exhibit 55) to the effect that Kloss was competent and able to make financial decisions. Panel members viewed portions of two video tapes of Kloss, one taken in 1998 and the other on June 18, 2003 (Exhibit 71). Kloss appeared to be alert and competent. Rules 1.14, 2.1 and 8.4(c) MRPC, therefore, were never implicated.

37. The fee agreements were confusing and inconsistent. However, it appears that Kloss and Parrent understood them and Engel conceded that the underlying purpose of the changing financial arrangements was to "bulk up" the fees so as to be in the best position to make a fee claim if Kloss prevailed against Jones. Transcr. 286:24-287:20. Engel told Parrent and Kloss that bulking up the fees in the Jones litigation would also provide a greater income tax deduction. Transcr. 255:15-256:16. The CRT litigation was therefore re-characterized and fees attributable to the various projects were shifted

around. However, there is no clear and convincing evidence that Engel manipulated the fee agreements for personal gain beyond what he was earning on an hourly basis, or to take advantage of Kloss' advanced age.

38. It should also be noted that the instant complaint to ODC was lodged by attorney James, Engel's adversary in bitter and protracted litigation, and not by Parrent or Kloss.

From the foregoing Findings of Fact, the Commission on Practice makes the following

CONCLUSIONS OF LAW

1. The evidence is not clear and convincing that Engel violated any of the rules of professional conduct with which he was charged.

2. The complaint should be dismissed.

RECOMMENDATION

Upon consideration of the evidence presented, the Commission on Practice unanimously recommends to the Montana Supreme Court that the complaint be dismissed.

DATED this 16 day of November, 2006.

/s/ John Warren
John Warren, Chairman

RULES FOR LAWYER DISCIPLINARY ENFORCEMENT

Adopted, effective July 1, 2002

As last amended, effective July 7, 2003

Publisher's Note

The Supreme Court for the State of Montana, by an Order dated December 11, 2001, "In Re Creation of the Office of Discipline Counsel; the Adoption of Structural Changes to the Commission on Practice; and the Adoption of Changes to Montana's System of Disciplining Lawyers", created the Office of Discipline Counsel, and adopted structural changes to the Commission on Practice and to Montana's system of disciplining lawyers.

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INTRODUCTION*

The Supreme Court of the State of Montana (hereinafter referred to as "Supreme Court" or "Court") declares that it possesses original and exclusive jurisdiction and responsibility under Article VII, Section 2(3), of the 1972 Montana Constitution and the provisions of Chapter 61, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction, in all matters involving admission of persons to practice law in the State of Montana, and the conduct and disciplining of such persons. In the exercise of that jurisdiction, the Court hereby adopts and promulgates the following Rules for Lawyer Disciplinary Enforcement. These rules shall be referred to as the Rules For Lawyer Disciplinary Enforcement (2002) or RLDE (2002).

[Adopted effective July 1, 2002.]

* * *

RULE 10. OFFICE OF DISCIPLINARY COUNSEL PROCEDURE

A. Central Intake and Evaluation. The Office of Disciplinary Counsel shall perform central intake functions including, but not limited to the following:

(1) Receive information and complaints regarding lawyers' misconduct from members of the public;

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* Caption supplied by Publisher.

(2) Make appropriate referrals regarding information and complaints while assuring that any member of the public who wishes to make a complaint against a lawyer is able to do so;

(3) Send to the complainant a packet of written materials containing forms, instructions and information about Montana's lawyer disciplinary process; and

(4) Receive written complaints on the forms provided.

B. Preliminary Review and Processing of Informal Complaints. The Office of Disciplinary Counsel shall conduct a preliminary review of each written complaint received by the Office and determine whether the complaint involves a matter that is within the disciplinary jurisdiction of the Court.

C. Investigation.

(1) All investigations shall be conducted by or under the authority and direction of Disciplinary Counsel. Upon such investigation as Disciplinary Counsel deems appropriate, he or she may:

(a)(1) Send the complaint to the lawyer against whom the complaint is made;

(2) Send the lawyer's response to the complainant and, if appropriate, request his or her reply to the lawyer's response;

(3) Prepare an intake summary; and

(4) Conduct an investigation and prepare an investigative report; or

(b) With or without some or all of the process set forth in Rule 10C(1)(a), dismiss the complaint without prejudice, where the complaint does not appear to be within the disciplinary jurisdiction of the Court, or the facts do not appear to warrant disciplinary action.

(2) *Notice of Disposition.* In the event of a dismissal, Disciplinary Counsel shall give written notice to the complainant and to the respondent of the dismissal, stating the reasons for the action taken, and advising the complainant of the right to request review of the dismissal, or to file an amended complaint.

(3) *Request for Review.* The complainant may file a written request for review of Disciplinary Counsel's dismissal within 30 days of the notice of disposition pursuant to Rule 10C(2). Disciplinary Counsel's dismissal shall be reviewed by a Review Panel upon the record before it. The Review Panel may approve, disapprove, or modify Disciplinary Counsel's disposition.

D. Review Panel Proceeding. Disciplinary Counsel shall:

(1) Prepare recommendations to a Review Panel;

(2) Present the intake summary, investigative report and recommendations to a Review Panel, orally supplementing them at the request of a Review Panel; and

(3) Conduct further investigation at the request of a Review Panel.

E. Adjudicatory Panel Proceeding. Disciplinary Counsel shall:

(1) Draft and prosecute formal complaints and complaints proposing interim suspension before an Adjudicatory Panel;

(2) Recommend discipline or other disposition of a case to an Adjudicatory Panel;

(3) Conduct any discovery pursuant to Rule 19;

(4) At the request of an Adjudicatory Panel, investigate all allegations in a petition for reinstatement and present relevant evidence at an Adjudicatory Panel hearing on the petition; and

(5) Advocate findings of fact and conclusions of law resulting from Adjudicatory Panel proceedings.

[Adopted effective July 1, 2002; amended effective July 7, 2003.]

* * *

RULE 16. REVIEW BY THE SUPREME COURT

After service of a copy of the findings of fact and conclusions of law and recommendation of discipline to the lawyer and to lawyer's counsel, if any, the lawyer shall have thirty days from date of service within which to file with the Court objections to the findings of fact and conclusions of law and recommendation of discipline, and a written brief in

support thereof. The lawyer or the lawyer's counsel shall serve upon Disciplinary Counsel a copy of any such objections and brief in support thereof. Disciplinary Counsel shall have thirty days after date of service of such objections and written brief within which to file with the Court a written brief in opposition to such objections, and a copy of such brief shall be served upon the lawyer or the lawyer's counsel. The Court may, in its discretion, set the matter for oral argument if the Court deems oral argument appropriate. Thereafter, or in the event objections are not filed by the lawyer, the matter shall be deemed submitted and the Court shall determine the appropriate discipline, if any, authorized by these rules. In the event objections are not filed, the matter shall be deemed submitted at the expiration of the time for filing objections and the Supreme Court shall consider the matter, issue its written decision, and impose such discipline if any, as it considers appropriate. In the imposition of discipline, the Court may fix a time and place for the lawyer to appear before it. The Clerk shall notify the Commission, Disciplinary Counsel, the lawyer and the lawyer's counsel of the time and place of the appearance and the purpose thereof. At such time and place the lawyer shall appear in person, may he accompanied by counsel, and may make a statement with respect to the discipline to be imposed. Thereupon the Court shall impose such discipline as it deems appropriate.

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